(90) XIV/956

The Law Reports 1894, (Chancery division)

A. A. R. Stone

S-Law and Legislation/Law Reports/Chancery division/London/1894

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CHARITY—*Will—Legacy - Charitable Intention - Failure of Particular Object in Testator's Lifetime -Lapse—Cy-près.*] A testator bequeathed a legacy of £5000 "to the rector for the time being of *St. Thomas' Seminary* for the education of priests in the diocese of *Westminster* for the purposes of such seminary" At the date of the will *St. Thomas' Seminary* was carried on at *Hammersmith*, but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near *Birmingham*.

Held (affirming the decision of *Chitty*, J.), that the bequest was for the benefit of the particular institution, and, that institution having ceased to exist in the testator's lifetime, the legacy could not be applied *cy-près* but lapsed and fell into the residue

Clark v. *Taylor* (1 Drew. 642) and *Fish* v. *Attorney-General* (Law Rep 4 Eq. 521) followed. *In re Rymer. Rymer* v. *Stanfield* C.A. 19

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Whether such an expression of opinion is or is not a condition precedent to obtaining an order for public examination, it is a convenient practice which the Court will in general require to be followed before it makes such an order.

Held, by the Court of Appeal, that the Court has no jurisdiction under sect. 5 to direct a public examination, unless the Official Receiver either states expressly in his further report that in his opinion some fraud such as is mentioned in sect 8, sub-sect. 2, has been committed, or the facts which are stated in the report shew clearly that in his opinion such a fraud has been committed.

If the report merely suggests or gives rise to a suspicion of fraud, this is not enough to give the Court jurisdiction to direct a public examination.

In re Trust and Investment Corporation of South Africa ([1892] 3 Ch. 332), *In re Lanon & Co* ([1893] 1 Ch. 210), and *In re Birkdale Steam Laundry and Carpet Beating Company* ([1893] 2 Q. B. 386) discussed. *In re General Phosphate Corporation. In re Northern Transvaal Gold Mining Company. In re Delhi Steamship Company* .. .. C.A. 3

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and ordinary shares, and, within the period named, transferred to the Plaintiff shares of the latter class of the nominal value of £1000, and purporting to be fully paid; but no contract in respect of them had been registered previous to their issue, nor were they in fact fully paid up in cash, and the Plaintiff refused to accept them. After the expiration of the twelve months a contract in respect of the shares was filed with the Registrar of Joint Stock Companies. The shares of the company were of no value, and had never been marketable.

In an action to recover the sum of £1000:—

Held, by *Sterling*, J., that the Plaintiff was not bound to accept shares in a company in which all the shareholders did not stand on a footing of equality, and that, as the Defendant had by so forming the company put it out of his power to comply with that branch of the covenant which related to the shares, he must perform the alternative and pay the £1000.

Studholme v. *Mandell* (1 Ld. Raym. 279) followed.

Held, by the Court of Appeal, that "£1000 worth of shares" meant shares of that value in the market: and, the shares transferred being of no marketable value, the judgment of *Sterling*, J., was affirmed on that ground. *McIlquham* v. *Taylor* .. C.A. 73

CONFLICT OF LAWS—*Administration—Land situate in Foreign Country—Trusts invalid under Foreign Law—Valid Trust for Sale—Application of Proceeds of Sale—Election*.] An English testator, who owned some land in *Sardinia*, by his will gave all his real and personal estate to trustees upon trust for sale and conversion, and to hold the same until conversion and the proceeds of sale after conversion, upon certain trusts (*inter alia*) for his children for their respective lives, with remainders to their respective issue. These trusts were (as the Court held on the evidence) to a great extent invalid under Italian law as regarded land in *Italy*, the result being that the tenants for life took their shares absolutely. Part of the land in *Sardinia* had been sold by the trustees:—

Held, that, whether the trustees or the children took the land as "heirs," according to the Italian law, the trustees had power under that law, and that it was their duty to sell the land, and that the proceeds of sale must be held by them upon the trusts declared by the will.

Held, also, that the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to and legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of sale. *In re Percy. Whitnham* v. *Percy* .. .. .. NORTH, J. 83

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parties as a judgment whereby the Court exercises its mind on a contested case.

An action was brought against a company to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the company:—

Held (affirming the decision of *Vaughan Williams*, J.), that judgment by consent for the Plaintiffs precluded the liquidator in the winding-up of the company from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.

Jenkins v. *Robertson* (Law Rep. 1 H. L., Sc. 117) distinguished.

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A legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children.

The provisions of sect. 43 of the *Conveyancing Act*, 1881, as to the maintenance of infant legatees must, for the purpose of determining whether a legacy to an infant child carries interest, be treated as incorporated into any will to which they are applicable.

A testator bequeathed a legacy to his infant son payable at twenty-one, and legacies to his daughters, one of whom was an infant, and gave his residuary real and personal estate to trustees upon trusts in favour of his children equally. He declared that his trustees might at their discretion raise any part not exceeding one moiety of the expectant share of any child, and apply the same for his or her advancement, preferment, or benefit. The will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions contained in sect. 43 of the *Conveyancing Act*, 1881, were applicable:—

Held, that sect. 43 of the *Conveyancing Act*, 1881, ought to be read as part of the will, but that, though it were so read, yet there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, and accordingly that the legacies to the infant son and daughter respectively carried interest as from the death of the testator. *In re Moody. Woodroffe v. Moody* .. .. KEKEWICH, J. 101

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MORTGAGE,—*Consolidation—First Mortgages of different Properties to distinct Mortgagees—Second Mortgage of all Properties to one Mortgagee—Subsequent Union of First Mortgages—Redemption*] The owner of several houses in the years 1863–1866 executed first mortgages of them to different mortgagees for distinct sums. In 1868 he gave a second mortgage on all the houses to the Plaintiff's predecessors in title. In 1885 the second mortgage was transferred to the Plaintiff. Before 1893 all the first mortgages had become vested in the Defendants. In 1893 the Plaintiff brought an action against the Defendants to redeem two of the first mortgages upon payment of the amount due under them only.

It was held by *Romer*, J., following *Vint* v. *Padget* (2 De G. & J. 611) and *Tweedale* v. *Tweedale* (23 Beav. 341), that the Defendants were entitled to consolidate all the first mortgages.

Held, by the Court of Appeal, that *Vint* v. *Padget*, being the decision of a Court of co-ordinate jurisdiction, could not be overruled by their Lordships, and that the appeal must be dismissed. *Pledge* v. *Carr* .. .. C.A. 51

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1. PRACTICE—*Appeal—Order of Single Judge of Court of Appeal—Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 52—*Supreme Court of Judicature* (*Procedure*) *Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*).] A motion to discharge or vary an order of a single Judge of the Court of Appeal, under the 52nd section of the *Judicature Act*, 1873, is not an appeal within the meaning of the 1st section of the *Supreme Court of Judicature* (*Procedure*) *Act*, 1894, and may be made without leave of the Judge or of the Court of Appeal. *Boyd* v. *Bischoffsheim* .. .. C.A. 1

2. ——— *Agreement that a Third Party shall conduct Defence of Action—Retainer of Solicitor—Appeal to House of Lords—Withdrawal of Retainer—Injunction.*] The Defendant in an action for the infringement of a patent for machines agreed with *M.*, from whom he had purchased the machine complained of, that *M.* should have the sole conduct of the defence of the action and that his solicitor should be employed in the proceedings, on giving an indemnity to the Defendant against damages and costs.

A deed of indemnity was accordingly executed, and the Defendant gave a retainer to *M.*'s solicitor to act for him "in the defence of the action and any appeals therefrom." The action was tried and an appeal brought to the Court of Appeal, in which the Defendant was defeated. An appeal was then presented in his name to the House of Lords, and a deposit for costs paid; but the Defendant, wishing to stop the proceedings, withdrew his retainer of *M.*'s solicitor, and took steps to withdraw the appeal to the House of Lords:—

Held, that *M.* was entitled to an injunction to restrain the Defendant from breaking his agreement to allow *M.* to conduct the defence, and from withdrawing his retainer of *M.*'s solicitor. But under the circumstances the Court took an undertaking from *M.* to give a further indemnity against extra costs in the House of Lords. *Montforts* v. *Marsden* .. .. C.A. 11

3. ——— *Receiver—Receiver's Recognizance—Rents and Profits of Real Estate—Insurance Money—Repairs—Sureties—Extent of Liability.*]

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In ascertaining the liability of sureties under a receiver's recognizance, the Court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for. consequently, where a receiver of "rents and profits" of real estate had (1.) insured some of the farm buildings in his own name, and received and misapplied the insurance money, had (2) received, and not accounted for dividends on Consols in Court representing proceeds of sale of real estate, and had (3) received, under an order of the Court, money representing personal estate, to be spent in repairs, which he had misappropriated:—

Held, that the sureties had been properly charged in respect of these three items.

Practice and duties of receivers of rents and profits as to insurance and repairs discussed. *In re Graham. Graham* v. *Noakes.*

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1. SETTLEMENT—*Voluntary Settlement—Trust for a Class—Period of ascertaining Class.*] The rule in *Andrews* v. *Partington* (3 Bro. C. C. 401) is not confined to wills, but is applicable to a voluntary settlement (and, *semble*, to a settlement for value)

A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, and in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—

Held, that when one younger child attained a vested interest in possession the class was closed, and such child was entitled to be then paid a share. *In re Knapp's Settlement. Knapp* v. *Vassall.*

NORTH, J. 91

2 ——— *Covenant to Settle Wife's other and after-acquired Property — Income — Accumulations — Purchase by Wife during her Coverture—Loan—Charge in Favour of Trustees.*] If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital.

The same result follows in the case of a sale of capital property not originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.

Lewis v. *Madocks* (8 Ves. 150, 17 Ves. 48) discussed. *In re Bendy. Wallis* v. *Bendy* .. .. KEKEWICH, J. 109

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SOLICITOR—*Costs—Taxation—Agreement for Tenancy for less than Three Years—"Leases or Agreements for Leases, at Rack-rents"—Scale Fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44), *ss.* 2, 4—*General Order under Solicitors' Remuneration Act*, 1881, *r.* 2, *Sched.* I., *Part* II.—*Lessor and Lessee—Cost of Counterpart.*

In the absence of any prior written agreement, the Taxing Master is bound to tax according to scale in all cases where the scale is applicable, notwithstanding the fact that an item bill has been delivered at the request of the client. The fact that a solicitor has delivered an item bill in the first instance does not preclude him, when before the Taxing Master, from consenting to its being taxed according to scale. *In re Heather* (Law Rep. 5 Ch. 694) held not to apply to such a case.

The costs of the lessor's solicitor "for preparing, settling, and completing" an agreement for a tenancy for less than three years at a rack-rent are to be taxed according to the scale prescribed for "Leases or Agreements for Leases at a Rack-rent" in Schedule I., Part II., to the General Order under the *Solicitors' Remuneration Act*, 1881.

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44 & 45 Vict. c. 44 (Solicitors' Remuneration), ss. 2, 4. See Solicitor 73

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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

BOYD *v.* BISCHOFFSHEIM.

C. A.
1894
Oct. 24, 25.

[1894 B. 729.]

Practice—Appeal—Order of Single Judge of Court of Appeal—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 52—*Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 *Vict. c.* 16), *s.* 1, *sub-s.* 1 (*b*).

A motion to discharge or vary an order of a single Judge of the Court of Appeal, under the 52nd section of the *Judicature Act*, 1873, is not an appeal within the meaning of the 1st section of the *Supreme Court of Judicature (Procedure) Act*, 1894, and may be made without leave of the Judge or of the Court of Appeal.

THE action in this case was dismissed with costs by Mr. Justice *North* in July, 1894, as being frivolous and vexatious. The Plaintiff appealed from this judgment. The Defendants, on the 16th of October, applied to the Lord Chief Justice, Lord *Russell*, sitting in the Vacation as a Judge of the Court of Appeal, for an order that the Plaintiff might give security for the costs of the appeal, and that the appeal might be postponed till security was given.

His Lordship ordered the Plaintiff to give security to the amount of £100 to each of the Defendants, but declined to order the appeal to be postponed till such security was given.

The Plaintiff now moved to discharge the order of the Lord

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Chief Justice, and the Defendants also moved to vary it by directing the appeal to be postponed till security had been given.

The order was made under sect. 52 of the *Judicature Act*, 1873 (1).

By the *Supreme Court of Judicature (Procedure) Act*, 1894 (57 & 58 Vict. c. 16), s. 1, sub-s. 1 (*b*), it is enacted that no appeal shall lie without the leave of the Judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a Judge, except in certain cases therein specified, none of which included the present case. No leave was obtained to make the present application.

Turrell, for the Plaintiff.

Cozens-Hardy, Q.C., and *Gregson*, for the Defendant *E. R. McDermott*.

A. Young, for the Defendant *E. McDermott*.

Pollard, for the Defendant *Bischoffsheim*.

LINDLEY, L.J., said that he was of opinion that a motion to discharge or vary the order of the Lord Chief Justice sitting as a single Judge of the Court of Appeal was not an appeal within the meaning of sect. 1 of the *Supreme Court of Judicature (Procedure) Act*, 1894, and did not require the leave of the Judge or of the Court of Appeal. In the present case the Plaintiff's motion must be refused, and the motion of the Defendants must be allowed. The appeal would, therefore, be stayed till the security was given.

(1) 36 & 37 Vict. c. 66, s. 52: "In any cause or matter pending before the Court of Appeal any direction incidental thereto, not involving the decision of the appeal, may be given by a single Judge of the Court of Appeal; and a single Judge of the Court of Appeal may at any time during Vacation make an interim order to prevent prejudice to the claims of any parties pending an appeal as he may think fit; but every such order made by a single Judge may be discharged or varied by the Court of Appeal or a Divisional Court thereof."

A. L. SMITH, L.J., said that he was of the same opinion. The recent Act was not intended to affect nor had it affected the special enactment of sect. 52 of the *Judicature Act*, 1873.

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Solicitors: *W. C. Goulding; Hores & Pattisson; J. Holmes & Son; Freshfields & Williams.*

M. W.

In re GENERAL PHOSPHATE CORPORATION.

[0096 of 1893.]

In re NORTHERN TRANSVAAL GOLD MINING COMPANY.

[0186 of 1892.]

In re DELHI STEAMSHIP COMPANY.

[0073 of 1893.]

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VAUGHAN WILLIAMS, J.
April 25
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Oct. 31.

Company—Winding-up—Public Examination—Further Report of Official Receiver—Allegation as to Fraud—Statement based on Information and Belief—Statement of Opinion—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8, *sub-ss.* 2, 3.

Held, by *Vaughan Williams*, J., that sub-sect. 2 of sect. 8 of the *Companies (Winding-up) Act*, 1890, when it speaks of the further report of the Official Receiver stating whether in his opinion any fraud has been committed, cannot mean more than that the Official Receiver shall state that, on the information before him, uncontradicted and unexplained, he is of opinion that a *primâ facie* case is made of fraud having been committed by some person—not defining which person—falling within the description of persons mentioned in the sub-section, and that he believes such information to be true.

Whether such an expression of opinion is or is not a condition precedent to obtaining an order for public examination, it is a convenient practice which the Court will in general require to be followed before it makes such an order.

Held, by the Court of Appeal, that the Court has no jurisdiction under sect. 8 to direct a public examination, unless the Official Receiver either states expressly in his further report that in his opinion some fraud such as is mentioned in sect. 8, sub-sect. 2, has been committed, or the facts which are stated in the report shew clearly that in his opinion such a fraud has been committed.

If the report merely suggests or gives rise to a suspicion of fraud, this

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is not enough to give the Court jurisdiction to direct a public examination.

In re Trust and Investment Corporation of South Africa (1), *In re Laxon & Co.* (2), and *In re Birkdale Steam Laundry and Carpet Beating Company* (3) discussed.

ORDERS were made by the High Court of Justice for the winding up of the *General Phosphate Corporation, Limited*, the *Northern Transvaal Gold Mining Company, Limited*, and the *Delhi Steamship Company, Limited*.

In each case the Official Receiver had made a further report to the Court with reference to the company's affairs, purporting to be made in pursuance of sect. 8, sub-sect. 2, of the *Companies (Winding-up) Act*, 1890 (4), and suggesting that certain persons therein named should be publicly examined.

The Official Receiver did not, however, in any of his reports state in terms that "in his opinion any fraud" had "been committed by any person," and some of the statements in the report were based only on the information and belief of the Official Receiver.

The Official Receiver having applied in Chambers to Mr. Justice *Vaughan Williams* to consider the reports and to direct

(1) [1892] 3 Ch. 332.
(2) [1893] 1 Ch. 210.
(3) [1893] 2 Q. B. 386.
(4) By sect. 8: "(1) Where the Court has made an order for winding up a company, the Official Receiver shall, as soon as practicable after receipt of the statement of the company's affairs, submit a preliminary report to the Court" (*inter alia*) "(*c*) whether in his opinion further inquiry is desirable as to any matter relating to the promotion, formation, or failure of the company, or the conduct of the business thereof. (2.) The Official Receiver may also, if he thinks fit, make a further report, or further reports, stating the manner in which the company was formed and whether in his opinion any fraud has been committed by any person in the promotion or formation of the company or by any director or other officer of the company in relation to the company since the formation thereof, and any other matters which in his opinion it is desirable to bring to the notice of the Court. (3.) The Court may, after consideration of any such report, direct that any person who has taken any part in the promotion or formation of the company, or has been a director or officer of the company, shall attend before the Court on a day appointed by the Court for that purpose, and be publicly examined as to the promotion or formation of the company, or as to the conduct of the business of the company, or as to his conduct and dealings as director or officer of the company."

certain persons therein named to attend to be publicly examined, his Lordship, after considering the reports, took time to consider his decision thereon, which, on the 25th of April, 1894, was stated by him in Court, as set out below.

1894. April 25. VAUGHAN WILLIAMS, J.:—

The question I have to decide, before I can make the order for examination asked for in these cases, is whether or not the statement in terms by the Official Receiver in his report of his opinion that "a fraud has been committed" by some person of the class mentioned in sub-sect 2 of sect. 8 of the *Companies (Winding-up) Act*, 1890, in the promotion or formation of the company, or in relation to the company since the formation thereof, is either a condition precedent to the jurisdiction to make the order for examination, or a condition, the presence of which the Court ought to require before making such an order, and what constitutes the expression of such an opinion?

This question has been before the Court of Appeal, and was argued by counsel in *In re Trust and Investment Corporation of South Africa* (1). The report of the Official Receiver in that case did not state in terms the opinion of the Official Receiver that fraud had been committed, but the Court nevertheless ordered a public examination. The judgment of the Court, however, was only given on an *ex parte* appeal, and was in terms only directed to the question whether the order for examination could be made on an *ex parte* application, and whether the report need indicate fraud on the part of the person ordered to be examined. Since, and in consequence of this decision, I have always thought it right to make orders if the report of the Official Receiver disclosed a *primâ facie* case of fraud, even though the report did not express in terms the opinion that fraud had been committed; and I have treated the report and application of the Official Receiver as a sufficient indication of the opinion of the Official Receiver. It seems, however, from observations of members of the Court of Appeal pending the argument in a recent case of the *New Zealand Loan and Mercantile Agency Company, Limited*, that the Court, without expressly

(1) [1892] 3 Ch. 332.

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departing from the decision in *In re Trust and Investment Corporation of South Africa* (1), and without saying that an expression in terms of an opinion by the Official Receiver that fraud has been committed was a condition of the jurisdiction of the Court to order a public examination, indicated a view that it was desirable that the Official Receiver should express in terms the opinion referred to in sub-sect. 2 of sect. 8. I, therefore, have now to consider how far I ought to require the expression in terms of such an opinion, and what the nature of the opinion thus to be expressed is.

Now, the object of the examination is manifestly to ascertain whether such fraud has been committed. It is obvious, therefore, that one should not read the section so as to make the conclusion in fact that such a fraud has been committed a condition precedent to the order for examination. The utmost that the section can mean is that the Official Receiver should state that, on the information before him, uncontradicted and unexplained, he is of opinion that a *primâ facie* case is made of fraud having been committed, and that he believes such information to be true. To give, however, to the words state "whether in his opinion any fraud has been committed," this meaning is no small departure from the literal meaning of the words; for to state an opinion that there is a *primâ facie* case that a fraud has been committed is manifestly not the same thing as to express an opinion that fraud has been committed. Some light is thrown on the meaning of the words by previous legislation, for the opinion of the Official Receiver embodied in his report seems to be made evidence by rule 333 of the Bankruptcy Rules of 1886, and the object of the Legislature generally would seem to be to enable the Official Receiver to bring before the Court matters as to which he has no personal knowledge, and can only be speaking from information and belief. Thus, by the 16th section of the *Debtors Act*, 1869, it is enacted that, "Where a trustee in any bankruptcy reports to any Court exercising jurisdiction in bankruptcy that in his opinion a bankrupt has been guilty of any offence under this Act, or where the Court is satisfied upon the representation of any creditor or member of the committee of

(1) [1892] 3 Ch. 332.

inspection that there is ground to believe that the bankrupt has been guilty of any offence under this Act, the Court shall, if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted, order the trustee to prosecute the bankrupt for such offence." Now, in this section it is impossible to suppose that it was intended that more should be required of the trustee (whose duties in this respect are now performed also by the Official Receiver), as the condition of an order to prosecute, than is required of a creditor making a representation to the Court. It is plain that, in either case, the facts must be stated, because the Court is only to order the prosecution if it appears to the Court that there is a reasonable probability that the bankrupt may be convicted—a matter of which the Court cannot judge unless the facts upon which the application is based are before it. Why, then, does the section require that the trustee or Official Receiver should report that in his opinion a bankrupt has been guilty of an offence under the *Debtors Act*? It seems to be because the Official Receiver is entitled to bring before the Court matters based on information and belief, in which case it is only reasonable that the expression of his belief in a *primâ facie* case of fraud should be made a condition of his obtaining an order for public examination.

It seems to me that sect. 8 of the *Companies (Winding-up) Act*, 1890, in the same way intends that the Official Receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person—not defining which person—falling within the description of persons mentioned in sub-sect. 2 of that section. I do not say that the expression of this opinion is a condition precedent, but I do say that it is convenient in practice that the opinion of the Official Receiver should be so expressed. The opinion so to be expressed, in my judgment, however, as I have already said, is merely an opinion of the Official Receiver that the facts of which he has knowledge, or information which he believes to be true, and which he sets forth in his report, constitute a *primâ facie* case that fraud has been committed in the promotion or formation of the company, or in relation to the company since the formation thereof. Unless,

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therefore, the Official Receiver is prepared to make this or an equivalent statement, I do not think that I ought to make an order. If he is willing to add this statement to each report, I shall then make the order in each case for the public examination; but in the case of the *General Phosphate Corporation* it will, in the first instance, be limited to two of the persons named in the report.

F. E.

The order drawn up in the case of the *General Phosphate Corporation* was as follows:—

The Official Receiver not being willing to state whether in his opinion any fraud has been committed by any person in the promotion or formation or in relation to the said company, or that the facts set forth in his reports constitute a *primâ facie* case that such fraud has been committed, the Judge doth not think fit to make any order upon the application.

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The Official Receiver appealed *ex parte* against the order in the case of the *General Phosphate Corporation*. The appeal was heard on the 31st of October, 1894.

Sir *R. T. Reid*, A.-G., and *Ingle Joyce*, for the Official Receiver:—

This Court has held that an order under sub-sect. 3 of sect. 8, for the public examination of promoters, directors, or officers of a company which has been ordered to be wound up cannot be made unless either the Official Receiver in his further report under sub-sect. 2 states expressly that fraud of the nature specified in that sub-section has been committed, or the facts which are stated in his further report shew plainly that in his opinion such a fraud has been committed: *In re Great Kruger Gold Mining Company* (1); *In re Trust and Investment Corporation of South Africa* (2). In *In re Lawon & Co.* (3), Mr. Justice *Vaughan Williams* interpreted those decisions as meaning that it would be sufficient if the report suggested that a fraud had been committed. This view was afterwards adopted by a divisional Court in *In re Birkdale Steam Laundry and Carpet Beating Company* (4) In the present case the further report of the Official Receiver

(1) [1892] 3 Ch. 307
(2) Ibid. 332.
(3) [1893] 1 Ch. 210.
(4) [1893] 2 Q. B. 386.

contains no express statement that in his opinion fraud has been committed, and it may be difficult to argue that the facts which he states shew plainly that such is his opinion; but the report contains elements of suspicion which amount to a "suggestion" of fraud, and the Official Receiver says that in his opinion it is desirable that a public examination should be held of the persons whose names he mentions.

LINDLEY, L.J.:—

In my opinion we must refuse this application; in fact we cannot do otherwise if we are to be consistent with our previous decisions. It appears to me now, as it did on the two former occasions, that we construed the Act rightly, and that there is no power to put in force this process of public examination upon a report by the Official Receiver which does not shew upon its face that some fraud has been committed, though not necessarily, as we have carefully explained, by a particular person. There is always great danger in going beyond, or varying, the language of an Act, but, adhering, as I do, to the view that "such report" in sect. 8, sub-sect. 3, means a "further report" and not the preliminary report," it follows that although the Official Receiver need not make a further report, yet if the Court is to order a public examination under this section it must have before it a report such as is referred to in sub-sect. 2, *i.e.* a report stating the manner in which the company was formed and whether in the opinion of the Official Receiver any fraud has been committed by any person in the promotion or formation of the company, or by any of its directors or officers in relation to the company since the formation thereof. In my opinion that is what he ought to state. The exact language in which he is to state it is another matter, and in *In re Trust and Investment Corporation of South Africa* (1) this Court held that the report was sufficient if it shewed fraud. That is, when the fraud was manifest on the face of the report the Court did not think it necessary to send it back to the Official Receiver in order to compel him to say in black and white that, in his opinion, fraud had been committed. That decision has been since interpreted in a way

(1) [1892] 3 Ch. 332.

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which is too lax. We did not intend in any way to depart from the requirement of the Act. But our observations have been understood as meaning that it would be sufficient if in his report the Official Receiver "suggested" fraud. The word "suggest" is very ambiguous. What we meant was, that circumstances must be stated in the report which shew that the Official Receiver is of opinion that some fraud has been committed. If the report shews that, I think it is unnecessary that we should act (so to speak) as drill sergeants, and insist that there should be in the report a paragraph stating in so many words that which is apparent on the face of it. But I think it is time for us to protest against the notion that we went the length of saying that a "suggestion" of fraud would be sufficient.

The result is that, in my opinion, the order of Mr. Justice *Vaughan Williams* is quite right, because this report, even if it does "suggest" fraud, is perfectly consistent with the absence of any fraud, and we cannot from it arrive at the opinion of the Official Receiver that any fraud has been committed. Whether fraud has or has not been committed is not apparent on the face of the report, either in form or in substance. If we are wrong in our construction of the Act the House of Lords must put us right.

A. L. Smith, L.J.:—

I am entirely of the same opinion. I think the pith of Mr. Justice *Vaughan Williams'* judgment is this. He says: "It seems to me that sect. 8 of the *Companies (Winding-up) Act*, 1890 . . . . intends that the Official Receiver should report matters of information and belief, but that when doing so he should pledge himself that such matters in his opinion constitute fraud by some person—not defining which person—falling within the description of persons mentioned in sub-sect. 2 of that section." It seems to me that that really expresses what this Court has already laid down. I think that the decision of the learned Judge in the present case was right.

Sir *R. T. Reid*, A.-G., asked that, in view of the *Supreme*

Court of Judicature (Procedure) Act, 1894 (57 & 58 Vict. c. 16), leave might (if necessary) be given to appeal to the House of Lords.

LINDLEY, L.J. :—

We will give you leave, if it is required. The matter is an important one and worthy of the consideration of the highest tribunal.

Solicitor: *Solicitor to Board of Trade.*

W. L. C.

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[1894 M. 8162]

Agreement that a Third Party shall conduct Defence of Action—Retainer of Solicitor—Appeal to House of Lords—Withdrawal of Retainer—Injunction.

The Defendant in an action for the infringement of a patent for machines agreed with *M.*, from whom he had purchased the machine complained of, that *M.* should have the sole conduct of the defence of the action and that his solicitor should be employed in the proceedings, on giving an indemnity to the Defendant against damages and costs.

A deed of indemnity was accordingly executed and the Defendant gave a retainer to *M.'s* solicitor to act for him "in the defence of the action and any appeals therefrom." The action was tried and an appeal brought to the Court of Appeal, in which the Defendant was defeated. An appeal was then presented in his name to the House of Lords, and a deposit for costs paid; but the Defendant, wishing to stop the proceedings, withdrew his retainer of *M.'s* solicitor, and took steps to withdraw the appeal to the House of Lords:—

Held, that *M.* was entitled to an injunction to restrain the Defendant from breaking his agreement to allow *M.* to conduct the defence, and from withdrawing his retainer of *M.'s* solicitor. But under the circumstances the Court took an undertaking from *M.* to give a further indemnity against extra costs in the House of Lords.

THIS was an appeal from a decision of the Deputy of the Chancellor of the County Palatine of *Lancaster*.

The Plaintiff, *A. Montforts*, was a manufacturer and patentee of weaving machines, carrying on business at *Munchen Gladbach*, in *Germany*. Through his agents at *Manchester*, *Grether & Co.*,

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he sold one of his machines to the Defendant *E. Marsden*. *E. Moser* was also a maker of similar machines, for which he had an English patent; and in November, 1891, he brought an action against *Marsden* for infringing his patent. *Marsden* informed *Montforts* that he should not defend the action unless he was indemnified by him against the costs. *Montforts* applied to the Court to be made a co-Defendant, but was unsuccessful (1). It was, however, eventually agreed that *Montforts* should conduct the defence, and a deed of indemnity was executed on the 6th of April, 1892, by which after reciting, among other things, that *E. Marsden* had agreed to allow *A. Montforts* to use his name and have the sole conduct of the defence of the action on being indemnified in manner thereinafter appearing, *A. Montforts* and *H. Geiler*, representing *Grether & Co.*, jointly and severally covenanted with *E. Marsden* to indemnify him, his heirs, executors, and administrators from all taxed costs and damages in the said action, but *Grether & Co.'s* indemnity was only to extend to £1000; and for the purposes aforesaid, if the solicitor for the said *A. Montforts* should be conducting the defence in the name of the said *E. Marsden*, the said *A. Montforts* and *Grether & Co.* covenanted to supply all moneys in the opinion of *Montforts'* solicitor necessary and proper for the due carrying on of the defence of the proceedings, and to furnish all necessary proofs and evidence, and to indemnify *Marsden* from all liability in respect of any costs, charges, and expenses in the conduct of such defence. And they further covenanted not to pledge the credit of *Marsden* for any costs, charges, or expenses incurred by them in relation to such defence.

Mr. *E. Robinson Walker* was *Montforts'* solicitor, and on the 5th of February, 1892, he was retained by *Marsden* as his solicitor "in the defence of this action, and any appeals therefrom"; it being distinctly understood that his acceptance of such retainer was on the terms of his not charging *Marsden* personally with any costs whatever, or pledging his credit in any way. Mr. *Walker* accepted the retainer on those terms.

The action proceeded in the Palatine Court and was defended by *Montforts* and his solicitor in the name of *Marsden*; and a

(1) See *Moser* v. *Marsden* ([1892] 1 Ch. 487).

judgment was obtained on the 24th of March, 1893, dismissing the action with costs. From this judgment the Plaintiff *Moser* appealed, and the judgment was reversed, and the Defendant *Marsden* ordered to pay the costs of the action.

On the 17th of July, 1894, a petition of appeal was presented in the name of *Marsden* from this judgment, and a deposit of £700 was paid as security for costs of the appeal. All previous costs had been paid. *Marsden*, however, required further indemnity against the costs of the appeal as promoted in the House of Lords, and after considerable correspondence he withdrew his retainer from Mr. *E. R. Walker*, and acting through other solicitors took steps to withdraw the appeal in the House of Lords.

Montforts then issued the writ in the present action, claiming an injunction to restrain *Marsden* from acting in breach of his agreement to permit *Montforts* to have the sole conduct of the defence in the action of *Moser* v. *Marsden* (1), and from withdrawing his retainer from Mr. *E. R. Walker*. The Plaintiff then moved for an injunction in the terms of the writ, which was heard by Mr. *Taylor*, the Deputy of the Chancellor of the Palatine Court, who refused the motion.

The Plaintiff appealed from this order. It was agreed that the hearing of the appeal should be treated as the trial of the action.

Finlay, Q.C., and *Astbury* (*Hopkinson*, Q.C., with them), for the Appellant:—

On the true construction of the agreement the Plaintiff was empowered to conduct the defence in *Moser* v. *Marsden* to the close of the action, and this is made still clearer by the terms of the retainer of Mr. *Walker*, "in this action and any appeals therefrom." If the Court should think that an additional indemnity should be given for the costs in the House of Lords we will undertake to give it.

Oswald, Q.C., and *T. C. Eastwood*, for the Defendant:—

The deed of indemnity only mentions the trial of the action; there is nothing to shew that it was intended to extend beyond

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that. The trial of an action is the right of every suitor; an appeal has been called by a late learned Judge "a luxury." With respect to the retainer of the solicitor, whatever its terms may have been, it was by its very nature revocable. No man can be chained to a solicitor against his will. If the solicitor has any ground for complaint, he may bring his action for damages: *In re Galland* (1); *Rees* v. *Williams* (2); *Emmens* v. *Elderton* (3). At all events, additional indemnity ought to be given if the appeal is to proceed in the House of Lords.

LORD HERSCHELL, L.C.:—

This is an application to restrain Mr. *Marsden*, who was the Defendant in an action brought by a Mr. *Moser* from interfering with the prosecution of an appeal in that action by Mr. *Montforts*. It appears that Mr. *Montforts* is a patentee who had sold one of his patented machines to the Defendant *Marsden*. A claim was made by *Moser* that the machine was an infringement of a patent of his and thereupon he brought an action against *Marsden* for the purpose of restraining the infringement of his patent. *Montforts* was, of course, concerned to defend the validity of his patent and to maintain that the machine which he had sold to *Marsden* was not one which violated any rights of *Moser's*. *Marsden* not unnaturally was not particularly anxious, perhaps not desirous at all, to defend the action. Accordingly, an arrangement was come to between *Montforts* and *Marsden*. No agreement was entered into in writing, though two documents were executed, the one in the form of a retainer to *Montforts'* solicitors by *Marsden*, the other in the form of an indenture containing an indemnity; but these were only instruments employed for the purpose of giving effect to an agreement between *Montforts* and *Marsden*, which is to be implied from the circumstances and from the perusal of those documents. The agreement in its general nature was of a kind perfectly well known. It is a very common thing for a person who is interested in litigation much more than the nominal defendant to arrange that he shall have the conduct of that litigation, that it

(1) 31 Ch. D. 296. (2) Law Rep. 10 Ex. 200.
(3) 4 H. L. C. 624, 629.

shall be really his litigation, although it still has to be conducted in the name of the defendant who is sued. That is the nature of the agreement entered into. It was intended as between *Marsden* and *Montforts* that, although *Marsden* was the person sued, *Montforts* should be the person defending taking charge of and acting really as the litigant, and, as is common in such cases, it was part of the arrangement that the solicitor of the real litigant should be the solicitor who was to conduct the litigation. That was the general nature of the arrangement come to, and its extent and scope are to be gathered from the circumstances and the terms of the documents.

There has been some criticism of the language of the deed of indemnity with a view of shewing that it applied to the action only up to trial, and not to any subsequent appeal. It is not necessary to express an opinion upon it, although I may say that I think, to say the least, that it is open to very great doubt, and the parties, it may be observed, did not act upon that view because it is obvious that the appeal which was brought in the Court of Appeal after the action had been tried was treated by the parties as though it were a matter covered by the deed of indemnity. But when one looks at the terms of the retainer which are in no respect ambiguous, I think it is impossible to doubt that the intention of both parties was that the litigation, not only in the first trial of the action, but in any appeals therefrom, should be conducted by *Montforts*, and that in the conduct of them his solicitor should be employed.

I think the fallacy of Mr. *Oswald's* argument lies in this, that it is not a question of *Marsden* being chained to a particular solicitor in litigation which is being conducted for him; it is a question of his interfering with the real litigant who he has agreed shall conduct the proceedings in his name in the employment of the solicitor whom he wishes to employ.

In the course of the argument, I asked Mr. *Oswald* whether he could contend that if in pursuance of an arrangement of this sort the defence to the action had been commenced by Mr. *Walker* as solicitor for *Montforts* and on his instructions, and it had been prosecuted down to the eve of the trial, then *Marsden* could come in and say, "I withdraw my retainer, Mr. *Walker* shall

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no longer act for me. I will substitute my own solicitors, and they may, pursuant to some arrangement I have made with the plaintiff, give the plaintiff judgment," so rendering the whole of the costs which had been incurred absolutely abortive. Mr. *Oswald* naturally shrunk from maintaining that they could take any such course. But if so, and if in such a case as that, they would not be allowed to set aside *Montforts'* solicitor who had been really acting for him, I am at a loss to see how they can do it at a later stage, seeing that the terms of the retainer apply not only to the defence to the action, but to any appeals therefrom, putting the appeals on precisely the same basis as the defence to the action, and rendering it, as it seems to me, as impossible to contend that they have a right to intervene in the way they are contending for at the later stage as it would have been at the point of time I put, namely, immediately before the trial of the action.

No doubt if the Defendant had been in peril, if the prior costs had not been paid, if there were some reason to doubt whether he would not be left liable to loss in a litigation, that was not really his but another's, the Court would have been very unwilling to interfere to bring about such a result. It might even then be doubtful whether the answer to any such objection would not have been, "Before entering into the agreement into which you did enter, you should have taken care that the indemnity which you obtained was sufficient to satisfy you throughout, and in all events. If you have not done so it may be your misfortune, but you cannot now insist upon intervening." But it is not necessary to consider that question because the case now stands in this way. £700 has been deposited in the House of Lords to answer the costs of the appeal. It is suggested that that may not be sufficient. It is suggested also that the indemnity provided for by the indenture would not cover any extra costs in the House of Lords, but all those difficulties are really got rid of by the undertaking which has now been given.

I think that the order should be prefaced by a statement that £700 has been deposited in the House of Lords, and that *Montforts* and *Geiler* undertake that the indemnity provided for by the

indenture of the 6th of April, 1892, shall apply to any costs of the appeal not covered by the £700 deposited; and on that undertaking restrain the Defendant from taking any step in or in relation to the action or any appeal therein by himself or by any solicitor other than *E. R. Walker*, and from interfering with the prosecution of any such appeal by *Montforts* in the name of the Defendant.

I think that under the circumstances there should be no costs of these proceedings.

LINDLEY, L.J.:—

I am of the same opinion. Mr. *Oswald* has said and said truly that this is an unprecedented application. I certainly do not recollect any application of the kind, but the reason that it is unprecedented is that the circumstances have never arisen before.

There is a patent action of *Moser* v. *Marsden* (1), in which *Marsden* has been beaten. The real person interested in that patent action was not *Marsden* but *Montforts*, and *Montforts* is desirous, and has been always desirous, of defending the action. He defended the action, and there was an appeal to this Court, and now he wants to appeal to the House of Lords. It is an action in substance against him, and the defence is his; and there was an agreement, the whole terms of which are not in writing; but there was an agreement clearly to be inferred from the retainer and the indemnity deed that *Montforts* should be at liberty to use *Marsden's* name, and should indemnify him against the costs up to a certain point. That has been carried out loyally. Then there is an appeal to the House of Lords, and *Marsden*, for some reason or other, takes the view that the proceedings shall be stopped. I think it is only throwing dust into our eyes to say that all he wants is to get further security. The £700 deposited as security for the costs of the appeal as long ago as July are sufficient, and if £700 had not been enough we should have had some affidavit to say so or some application to increase it. But it seems to me that it is obvious from what took place

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in the Court below, and what has taken place here for some reason or other which it is quite unnecessary to go into, *Marsden* has changed his mind and does not want to go on with the appeal to the House of Lords, and intends to stop it if he can. That is a gross breach of faith in my opinion towards *Montforts* and ought to be stopped, and inasmuch as the circumstances are unprecedented, the order will be unprecedented.

I think the parties are quite right in treating this as an appeal from the judgment on the trial of the action, and that there is no necessity to have the case fought over again, and this I think ought to be stated in the order. Then, with the undertaking which the Lord Chancellor has referred to, I think the injunction should go.

A. L. SMITH, L.J.:—

The Lord Chancellor and Lord Justice *Lindley* have entirely covered the ground, and I have really nothing to add except that I agree.

Solicitors: *Jaques & Co.*, agents for *E. Robinson Walker & Co., Manchester; Norris, Allens & Chapman*, agents for *Diggles & Ogden, Manchester.*

M. W.

In re RYMER.
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[1894 R. 151.]

C. A.
1894
CHITTY, J.
May 28;
June 12.
C. A.
Nov. 5, 6.

Will—Legacy—Charity—Charitable Intention—Failure of Particular Object in Testator's Lifetime—Lapse—Cy-près.

A testator bequeathed a legacy of £5000 "to the rector for the time being of *St. Thomas' Seminary* for the education of priests in the diocese of *Westminster* for the purposes of such seminary." At the date of the will *St. Thomas' Seminary* was carried on at *Hammersmith*; but shortly before the testator's death the seminary ceased to exist, and the students who were being educated there were removed to another seminary near *Birmingham*.

Held (affirming the decision of *Chitty*, J.), that the bequest was for the benefit of the particular institution, and, that institution having ceased to exist in the testator's lifetime, the legacy could not be applied *cy-près*, but lapsed and fell into the residue.

Clark v. *Taylor* (1) and *Fisk* v. *Attorney-General* (2) followed.

HORATIO RYMER by his will, dated the 2nd of August, 1883, after bequeathing divers specific and pecuniary legacies, devised and bequeathed all his estate to the Plaintiffs upon trust to pay his funeral and testamentary expenses, and to pay and appropriate the legacies thereinbefore and thereinafter given, and he directed that his trustees should stand possessed of divers legacies which were settled as therein mentioned, and declared that all duty payable to Government on any legacies thereinbefore given should be paid out of the residue of his estate. The will then proceeded as follows: "Subject to and after payment and satisfaction of the before-mentioned legacies and the duties thereon, I give the following charitable legacies to the following institutions and persons respectively, all subject to legacy duties, that is to say, to the rector for the time being of *St. Thomas' Seminary* for the education of priests in the diocese of *Westminster* for the purposes of such seminary £5000; and I direct that the said rector shall at his discretion make a settlement thereof by deed in the names of proper trustees so as to

(1) 1 Drew. 642. (2) Law Rep. 4 Eq. 521.

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make the same a permanent fund. And I direct that the candidates to be educated out of the income of this bequest shall be nominated from time to time by the rector for the time being of such seminary. And I request, but not as a condition to this bequest, that a yearly mass for the repose of my soul may be said at the said seminary in perpetuity, and that a yearly mass for the same object may be said during life by each of the priests who may have been educated wholly or on part in this foundation." The testator then gave a legacy of £2000 to Cardinal *Manning* or the Archbishop of *Westminster* for the time being, to be applied for the purposes of the *Westminster* Diocesan Education Fund at discretion, and bequeathed other charitable legacies to a large amount, some of £2000 and some of £1000, and in each case he gave the legacy to the manager of the charity "for the purposes of such charity." And he directed that the aforesaid charitable legacies should be paid exclusively out of such part of his personal estate as by law could be given by will for charitable purposes, but that his estate should be so marshalled and applied that in case of a deficiency of assets the legacies, not being charitable, should be paid in priority to those which were charitable, and he directed that the residue of his estate should be held by his trustees upon the trusts therein declared concerning the same, and appointed the Plaintiffs executors of his will.

The testator executed two codicils, dated respectively the 14th of April, 1890, and the 10th of May, 1893, neither of which affected the bequests contained in the will. The testator died on the 5th of June, 1893. At the date of the will the institution called *St. Thomas' Seminary* was in existence. The seminary was established in or about the year 1869 at *Hammersmith*, for the education of priests for the diocese of *Westminster*, and was carried on without break from the time of its establishment until the month of March, 1893, and had a complete staff of professors and teachers. It was supported partly by the payments made by or on behalf of the students, and partly by the income of funds belonging to the diocese of *Westminster* and applicable for the purpose.

Cardinal *Manning* predeceased the testator; and at the

testator's death the Defendant, Cardinal *Vaughan*, was Archbishop of *Westminster*.

Prior to the death of Cardinal *Manning* it had been found that the expenses of carrying on the seminary at *Hammersmith* were heavier than the resources available could discharge, and shortly before Lady Day, 1893, such of the students as were ready for ordination were ordained, and the rest of the students were removed to *Oscott*, near *Birmingham*, where a seminary had been established by the Bishop of *Birmingham*, and was carried on by the bishop as president, for the education of priests for *Westminster*, *Birmingham*, and some of the other dioceses in *England*.

This was a summons taken out by the executors of the will for the opinion of the Court, whether under the circumstances the legacy of £5000 to the rector for the time being of *St. Thomas' Seminary* had lapsed and fallen into the residuary estate of the testator; and if the Court should be of opinion that the legacy had not lapsed, then how the same should be dealt with or disposed of. The summons came on to be heard before Mr. Justice *Chitty* on the 23rd of May, 1894.

Levett, Q.C., and *T. L. Wilkinson*, for the Plaintiffs:—

The gift was to benefit the particular seminary for priests at *Hammersmith*; it is a clear gift to the rector for the time being for the purposes of that particular seminary. The testator intended to endow that particular seminary with £5000. It is not a gift for charities at large, but for a particular institution; and that institution having ceased to exist during the lifetime of the testator, the legacy has lapsed: *In re Ovey* (1); *Fisk* v. *Attorney-General* (2); *In re Slevin* (3).

Byrne, Q.C., and *P. F. S. Stokes*, for Cardinal *Vaughan*:—

We claim this legacy as being a gift to a trustee for purposes which still exist, namely, the education of priests for *Westminster*, *Birmingham*, and elsewhere. In *In re Ovey* the gift was to a particular institution; and, that particular institution having

(1) 29 Ch. D. 560. (2) Law Rep. 4 Eq. 521.
(3) [1891] 2 Ch. 236.

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ceased to exist, the gift was held to have lapsed. Here the gift is to the rector for the time being for educational purposes, and the Court will not allow the gift to fail because there is no trustee to take it. The educational purposes exist though the particular seminary has ceased to exist.

Ingle Joyce (Sir *J. Rigby*, A.-G., with him), for the Attorney-General:—

There is a sufficient general intention of charity to be gathered from the will to entitle the Court to execute this trust *cy-près*, and to direct a scheme for that purpose to be settled. There is a general intention to benefit students preparing themselves to become priests, and if the particular mode which the testator has directed has failed, it does not follow that the gift has entirely failed, and that the legacy belongs to the next of kin. If there is a general intention of benefiting a certain class of people, and the particular mode contemplated by the testator has failed, the Court, favouring charity as it has always done, will provide a mode other than that which the testator has pointed out: *Biscoe* v. *Jackson* (1). *In re Ovey* (2) and *Fisk* v. *Attorney-General* (3) are in direct conflict with the earlier authorities. In *Marsh* v. *Attorney-General* (4) it was held that a bequest to the president and trustees of a school, to be applied in instructing youth in specified subjects, did not fail by reason of the school having been closed before the testator's death or the date of his will, and a scheme was directed. In *In re Clergy Society* (5), where the object of the gift was not sufficiently defined, a scheme was directed. In *Loscombe* v. *Wintringham* (6), a bequest to the governors of a society instituted for the "increase and encouragement of good servants," and no such institution could be found, was held to be charitable and did not fail. *In re Maguire* (7) is also a decision in our favour. In that case there was a gift to the "*Church Pastoral Aid Society in Ireland*." There was no such society in *Ireland*, but there was a

(1) 35 Ch. D. 460.
(2) 29 Ch. D. 560.
(3) Law Rep. 4 Eq. 521.
(4) 2 J. & H. 61.
(5) 2 K. & J. 615.
(6) 13 Beav. 87.
(7) Law Rep. 9 Eq. 632.

society called the *Spiritual Aid Society*; and Vice-Chancellor *James* made an order for payment of the legacy to that society, as it was clear the testatrix intended to benefit a particular object of charity, namely, pastoral aid in *Ireland*. We therefore submit that the Court ought to hold that in this case the legacy has not lapsed and ought to direct a scheme.

Levett, in reply:—

None of the cases cited for the Attorney-General conflict with *In re Ovey* (1) and *Fisk* v. *Attorney-General* (2); they are all distinguishable.

1894. June 12. CHITTY, J.:—

The substantial questions are whether the legacy of £5000 bequeathed to the rector for the time being of *St. Thomas' Seminary* has lapsed and fallen into the residuary estate, or whether it ought to be applied *cy-près*. The point taken at the Bar, that there was a mere failure of the trustee, and that nothing was required except that the Court should appoint a new trustee in the place of the rector, cannot be maintained, and it is not necessary to discuss it. [His Lordship, having stated the facts as above set out, proceeded:—]

It cannot be properly said, and it was not argued before me, that the *St. Thomas'* institution migrated to *Oscott*, or that the only change which took place was a change in the local habitation of *St. Thomas'* institution, or that it was being carried on under a change of name only. The legacy was not claimed on behalf of *Oscott* as the successor of *St. Thomas' Seminary* or otherwise. It is a different institution, although one of its purposes was the same as that of *St. Thomas' Seminary*. In the result, I find as a fact that *St. Thomas' Seminary*, which existed in 1883, when the testator made his will, had ceased to exist at his death.

The legacy is bequeathed in these terms. [His Lordship read the bequest as above set out, and proceeded:—] This was followed by a legacy to the Archbishop of *Westminster* for the purposes of the *Westminster* Diocesan Education Fund, and by other charitable legacies.

(1) 29 Ch. D. 560. (2) Law Rep. 4 Eq. 521.

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On the construction of this gift I hold that it is a gift to a particular charitable institution for the purposes of the institution. It was argued that the words "for the education of priests in the diocese of *Westminster*" shew a general charitable intention for the education of priests for that diocese unconnected with *St. Thomas'*. But those words are, I think, merely descriptive of the particular institution, which was in fact a seminary for the education of such priests, and that the words are governed by what follows, namely, "for the purposes of such seminary." The rector, under the discretionary power conferred on him to make a settlement of the legacy in the names of the trustees so as to make a permanent fund, could not have directed the income to have been applied otherwise than for the purposes of the seminary. The direction that the candidates should be nominated by the rector of the seminary, and the request that yearly masses should be said "at the said seminary," and the reference to "this foundation" at the end of the gift, all tend to confirm the opinion that the benefit of the gift was confined to this particular institution.

Now, the rule established by *Fisk* v. *Attorney-General* (1) is, that where a legacy is bequeathed to a particular charitable institution existing at the date of the will, and the institution has ceased to exist before the testator's death, the legacy fails and lapses in the same way as in the case of an individual. Counsel for the Attorney-General appeared to express some dissatisfaction with that authority. No doubt the Vice-Chancellor in his judgment stated that he was far from saying that the question might not some day or other require further consideration; but the decision, which was founded on what the Vice-Chancellor considered to be settled authorities, was pronounced in 1867, more than a quarter of a century ago, and so far from its having been subsequently overruled by or dissented from in any subsequent case, it was followed in 1885 in *In re Ovey* (2), and, as I read the observations and judgments in *In re Slevin* (3), it has been recently approved by the Court of Appeal. I have no alternative but to treat it as a binding authority. It

(1) Law Rep. 4 Eq. 521. (2) 29 Ch. D. 560.
(3) [1891] 2 Ch. 236.

is, I think, right in principle. Charity, no doubt, has been favoured by Equity. It has been excepted from the rule against perpetuity, and it has been allowed the benefit of the *cy-près* doctrine. *Fisk* v. *Attorney-General* (1) places what seems to me to be a reasonable limitation on that doctrine. Many a testator has made a bequest in favour of a particular charity because he has been personally connected with it, because he approves of its system of management or for other special reasons, who would not have been minded to make any other similar charitable institution the object of his bounty.

The cases cited for the Attorney-General are consistent with *Fisk* v. *Attorney-General* and distinguishable. No doubt in a bequest where a particular charity appears to be or is named a general charitable intent or an intent extending beyond the limits of the particular institution may be discoverable sufficient to justify the application of the *cy-près* doctrine. In *Loscombe* v. *Wintringham* (2) the bequest was to the governors of a society instituted for the increase and encouragement of good servants. No such society could be found. From this it was not difficult to infer that the testator had no particular institution in mind, and that his intention was generally the increase and encouragement of good servants.

In re Clergy Society (3) was to the like effect. The gifts were made to the "following" societies established or carried on in *London*, and amongst those enumerated was the "*Clergy Society*." There being no society answering that description, a scheme *cy-près* was directed. In neither of these cases was there any institution shewn to be in existence at the date of the will.

In *Marsh* v. *Attorney-General* (4) the bequest was to the Trustees and President of the *Deal Nautical School* in trust to be invested in public funds and the yearly interest to be applied for the instruction of youth in the practical part of navigation and nautical astronomy. The *Deal Nautical School* was discontinued for want of funds several months before the date of the testator's will. Consequently, there was no such institution in existence

(1) Law Rep. 4 Eq. 521.
(2) 13 Beav. 87.
(3) 2 K. & J. 615.
(4) 2 J. & H. 61.

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when the will was made; and further, the gift was not confined to the purposes of the particular school, but was generally for the instruction of youth in the subjects mentioned; if the school had continued to exist, the trustees and president might properly have applied the income for instruction outside the school. These three cases of *In re Clergy Society* (1), *Marsh* v. *Attorney-General* (2), and *Fisk* v. *Attorney-General* (3), were all decided by Vice-Chancellor *Wood*.

In re Maguire (4), before Vice-Chancellor *James*, was, as I read the judgment, rather a case of misdescription of the particular charitable institution intended; if not, it was a case of a gift to an institution which did not exist at the date of the will, and from this circumstance an intention to devote the money to a particular object of charity, such as pastoral aid in *Ireland*, was readily gathered. The Vice-Chancellor referred in his judgment to *Fisk* v. *Attorney-General*, and expressed no dissent from that case.

In the case before me, I am unable to extract any general or particular intention of charity for the education of priests in the diocese of *Westminster* unconnected with or severable from *St. Thomas' Seminary*. The case appears to be in principle undistinguishable from *Fisk* v. *Attorney-General*.

A point was suggested but not argued, and, as I understood, abandoned, turning on the codicil executed by the testator on the 10th of May, 1893. It is sufficient to say that a codicil, whether purporting to confirm the will or not, does not revive a legacy already lapsed by the death of the legatee. Nor does the codicil afford any ground for letting in the application of the *cy-près* doctrine. There was no evidence to shew that the testator was aware on the 10th of May, 1893, that the seminary had ceased to exist.

For these reasons, I hold that the legacy has lapsed and fallen into the residue.

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From this decision the Attorney-General appealed. The appeal came on to be heard on the 5th of November, 1894.

(1) 2 K. & J. 615.
(2) 2 J. & H. 61.
(3) Law Rep. 4 Eq. 521.
(4) Ibid. 9 Eq. 632.

Cozens-Hardy, Q.C., and *Ingle Joyce* (Sir *R. T. Reid*, A.-G., with them), for the Appellant, contended, as in the Court below, that there was a sufficient intention to dedicate the gift to charity to be gathered from the will to justify the Court in executing the trust *cy-près* and in directing a scheme for the purpose to be settled. They cited *Moggridge* v. *Thackwell* (1); *Mills* v. *Farmer* (2); *Loscombe* v. *Wintringham* (3); *In re Clergy Society* (4); *Marsh* v. *Attorney-General* (5); *In re Maguire* (6): *Biscoe* v. *Jackson* (7) and *De Costa* v. *De Paz* (8); and distinguished *Clark* v. *Taylor* (9), *Russell* v. *Kellett* (10), *Fisk* v. *Attorney-General* (11), *In re Ovey* (12), and *In re Slevin* (13).

Byrne, Q.C., and *P. F. S. Stokes*, for Cardinal Vaughan, and

Levett, Q.C., and *T. L. Wilkinson*, for the Plaintiffs, were not called on.

LORD HERSCHELL, L.C.:—

In spite of the able argument which has been addressed to us by the learned counsel for the Appellant, I entertain no doubt that the judgment of Mr. Justice *Chitty* was right.

The first step to be taken is to construe the will of the testator. By his will, after providing for payment of certain legacies, he proceeds thus: [His Lordship read the bequest to the rector of *St. Thomas' Seminary* set forth above, and continued.—]

That bequest is followed by a number of other bequests: legacies of £2000 each are given to certain persons for school and orphanage purposes, the bequests in each case being described as given for the purposes of that particular institution. Then follow legacies to representatives of institutions having some of the same objects precisely as the previous gifts, each

(1) 7 Ves. 36.
(2) 1 Mer. 55.
(3) 13 Beav. 87.
(4) 2 K. & J. 615.
(5) 2 J. & H. 61.
(6) Law Rep. 9 Eq. 632.
(7) 35 Ch. D. 460.
(8) 2 Swans. 487, n.
(9) 1 Drew. 642.
(10) 3 Sm. & Giff. 264.
(11) Law Rep. 4 Eq. 521.
(12) 29 Ch. D. 560.
(13) [1891] 2 Ch. 236.

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legacy being limited in the case of these particular institutions to £1000. The contention on behalf of the Appellant is that from the gift now in question is to be inferred an intention on the part of the testator to benefit priests by educating them quite apart from their education taking place in or in connection with this particular seminary; that it is quite immaterial that he has designated that particular seminary; and that the gift can be regarded as a charitable one that must take effect even though that seminary should have ceased to exist at the time of the death of the testator. I am unable so to construe this bequest. I think in all these cases (and they may all be looked at for the purpose of throwing light on this bequest) the testator had in view particular institutions, and although their objects may be the same, he graduates his bounty towards them, shewing, for instance, that it was the education of the orphans at this or that institution which he had in his mind, and not merely the education of orphans, if I may say so, at large. In the first place I observe that he says: "I give the following charitable legacies to the following institutions and persons"—the persons are named in connection with the institutions. There is no person named except in connection with an institution, and therefore he indicates at the outset that the legacy is to be a legacy to the institution, although he names the officer of the institution who is to take it. It seems to me, therefore, that we start with that indication. Then he mentions *St. Thomas' Seminary*, it is true, in conjunction with the words "for the education of priests in the diocese of *Westminster*." It is said that those are his words and not part of the title of the institution; but it would be obviously a piece of prudence to insert those words in order to make sure that the bequest should go to the *St. Thomas' Seminary* which he had in view, not to any *St. Thomas' Seminary* which might possibly have existed not having that object and being a different institution. But the gift is to be for the purposes of such seminary, and then it is to be observed that, although he does not make it a condition of the gift, he does couple it with the request that a yearly mass for the repose of his soul may be said at the said seminary. The whole is localised and connected

with that institution as distinctly, as it seems to me, as a bequest could be. That is the construction which I put upon the language which the testator has used.

Now, there did exist such an institution answering in every respect the description given. That institution was no longer in existence at the time of the death of the testator. The Appellant contends that under those circumstances, and on the *cy-près* doctrine, the gift ought still to be treated as charitable, and to be applied to some cognate purpose. In support of this, when once the construction has been arrived at which I have put upon the will, I have been unable to find that they have cited a single authority in point. They placed reliance upon the decision of Lord *Eldon* in *Moggridge* v. *Thackwell* (1) and *Mills* v. *Farmer* (2). The nature of those cases, and the effect of the decision, I think, is very well emphasised in a short passage in Lord *Eldon's* judgment in the latter case. He points out that giving property "to such person as I shall name to be my executor," and appointing no executor, leaves that in the case of an individual a void gift. And then he says (3): "But, to give effect to a bequest in favour of charity, the Court will . . . . supply the place of an executor and carry into effect that which, in the case of individuals, must have failed altogether. This distinction has proceeded partly, perhaps, on principles in the Roman law which we do not at this time perfectly comprehend; and partly, no doubt, on the religious notions which formerly obtained in this country, according to which it fell to the Ordinary's province to distribute, in case of intestacy. A third principle, which it is now too late to call in question, is, that in all cases in which the testator has expressed an intention to give to charitable purposes, if that intention is declared absolutely, and nothing is left uncertain but the mode in which it is to be carried into effect, the intention will be carried into execution by this Court, which will then supply the mode which alone was left deficient." That is the principle in *Moggridge* v. *Thackwell* and in *Mills* v. *Farmer*, and of course would cover a considerable class of cases. The testator has defined the general

(1) 7 Ves. 36. (2) 1 Mer. 55.
(3) 1 Mer. 94.

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character of the charity which he has in view, but has left the objects to be specified by a particular individual who can no longer specify them. That is one illustration of it; but of course many might be given, all coming within the language to which I have referred.

Then reference is made to another class of case, such as *De Costa* v. *De Paz* (1), where there was a gift for a charitable purpose which the Court held to be illegal, and to which, therefore, it could not give effect; and in those cases, seeing that there was a charitable purpose, but it being one which the Court could not give effect to, the Courts have applied the money, so designed in their view for charity, in some charitable fashion other than that illegitimate method designated by the testator. Of course that is a class of case which we need not further discuss in connection with the one now before the Court.

But then follow a series of cases of another description, although coming within the same principle, it may be said, as *Moggridge* v. *Thackwell* (2) and *Mills* v. *Farmer* (3). The first of those is *Loscombe* v. *Wintringham* (4), where a bequest of £500 was given for a society for the encouragement of servants in good conduct. No such society was known to exist, and we may take it none did exist. The Court there said there was a charitable purpose; the machinery for carrying it into effect, the channel through which it should be carried into effect, has not been designated by the testator, but nevertheless the Court will carry it into effect. That was also the position in the case of *In re Clergy Society* (5), which was a society named, but which might as well have been left unnamed because there was no such society existing. The same was the case in *In re Maguire* (6), where a Church Pastoral Aid Society in *Ireland* was mentioned, which was also a non-existing society. Those cases also form a class which has been established upon the same principles and considerations as I think guided the Court in *Moggridge* v. *Thackwell* and *Mills* v. *Farmer*, and that class of case; but they do not seem to me to govern the present case when

(1) 2 Swans. 487, n.
(2) 7 Ves. 36.
(3) 1 Mer. 55.
(4) 13 Beav. 87.
(5) 2 K. & J. 615.
(6) Law Rep. 9 Eq. 632.

once the construction has been put upon the will which I have put on the will of this testator.

One other case I may allude to in connection with the class of cases beginning with *Loscombe* v. *Wintringham* (1), which I have mentioned, and that is the case of *Biscoe* v. *Jackson* (2). It seems to me that Lord Justice *Cotton* and Lord Justice *Lindley* in delivering their judgment in that case, so far from using language favouring the argument of the present appellant, seemed to assume the case against the appellant upon the construction which I have put upon the will, but decided in favour of the bequest there on the ground that it was not a bequest to any particular institution, but a bequest for a purpose which, if it could not be carried out precisely in the way named, must be carried out as nearly as possible.

Now I come to another class of cases within which I think the present case falls. The first of those is *Clark* v. *Taylor* (3), where reliance was placed upon *Loscombe* v. *Wintringham*; but the Vice-Chancellor declined to decide the case in the same way as *Loscombe* v. *Wintringham* had been decided, because he regarded that case as distinguishable. He did not intend to impugn that case, as he said, in the slightest degree, but he regarded it as not governing the case then before him. The language which he uses (and there have been few Judges more careful in their use of language or more accurate than he was) is this (4): "There is a distinction well settled by the authorities. There is one class of cases, in which there is a gift to charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect; if that mode fails, the Court says the general purpose of charity shall be carried out. There is another class, in which the testator shews an intention, not of general charity, but to give to some particular institution; and then if it fails, because there is no such institution, the gift does not go to charity generally; that distinction is clearly recognised; and it cannot be said that wherever a gift for any charitable purpose fails, it is nevertheless to go to charity. In many cases, it is difficult to see to which

(1) 13 Beav. 87.
(2) 35 Ch. D. 460.
(3) 1 Drew. 642.
(4) Ibid. 644.

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particular class the case is to be referred, and this is, to a certain extent, one of such cases." Now, there the Vice-Chancellor lays down the distinction in the clearest terms. It is said that in that case the facts shew that the institution had not ceased to exist till after the death of the testator, that, therefore, the decision of the Vice-Chancellor must be read as referable to such a case, and if so his decision has been overruled. I cannot think that any such point was raised in that case. It is true that on the statement of facts it would seem to have arisen; but then the statement of facts is now shewn to be inaccurate. The report states that the testator died in October, 1840, and an examination of the record has shewn that the testator did not die till October, 1846. It is true that *Drewry's* report states that the institution came to an end in November, 1846, which would have shewn that it survived the testator by a month or part of a month. But it is just as likely that there has been some mistake in the date of the cessation of the institution as in the date of the death of the testator—at all events, it is to me inconceivable that if such a point existed, and it could have have been argued in that case, that Mr. *Wickens*, who argued for the Crown, should not have made the point, and that there should be no allusion to it whatsoever in the judgment of the Vice-Chancellor. I therefore cannot regard the judgment of the Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1) as otherwise than a decision upon the point which it purports to decide, that having no relation to the fact that the institution had survived the testator. That clearly was the view taken by Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (2). He had there a similar point before him. The institution was the *Ladies' Benevolent Society* at *Liverpool*, and the institution had come to an end before the death of the testator. The Vice-Chancellor followed *Clark* v. *Taylor*, and held that, it having so come to an end, the gift failed altogether.

I pass by *Russell* v. *Kellett* (3), because on the facts of the case there may be some discussion as to how far the principle was properly applied; but the same principle was recognised by Vice-

(1) 1 Drew. 642.
(2) Law Rep. 4 Eq. 521.
(3) 3 Sm. & Giff. 264.

Chancellor *Stuart* in that case. It was afterwards recognised and followed in the case of *In re Ovey* (1) by Mr. Justice *Pearson*, and it seems to me that in the case of *In re Slevin* (2) in this Court not the slightest dissent was expressed from the view of Vice-Chancellor *Kindersley*, but rather the contrary. In delivering the judgment of the Court, Lord Justice *Kay* says (3): "In the present case we think that the Attorney-General must succeed, not on the ground that there is a general charitable intention that the fund should be administered *cy-près* even if the charity had failed in the testator's lifetime, but because, as the charity existed at the testator's death, this legacy became the property of that charity, and on it ceasing to exist its property falls to be administered by the Crown." So that, so far from throwing any doubt upon *Clark* v. *Taylor* (4), it seems to me to recognise the distinction and decides the case, not on any ground inconsistent with *Clark* v. *Taylor*, but exclusively on the ground that the charity having survived the testator the bequest had taken effect, and when the charity ceased to exist its property fell to the administrator of the Crown.

One case was referred to which was said to be somewhat an exception to those with which I have been dealing—the case of *Marsh* v. *Attorney-General* (5)—and at first sight it appeared to be so. It was a gift to the President of the Nautical School at *Deal*, and the Nautical School at *Deal* was not in existence at the time of the death of the testator. But, rightly or wrongly, it is quite immaterial to inquire, the Court there came to the conclusion on the true construction of the will that the money was given to the president of that school, not for the benefit of the school but that education might be given to certain boys; and it was said that the trust would have been perfectly discharged by educating the boys at *Oxford* and *Cambridge*, or elsewhere than at the school. It therefore really forms no exception in view of the construction put on that will to the cases to which I have been alluding.

I think I have now referred to every one of the cases which

(1) 29 Ch. D. 500.
(2) [1891] 2 Ch. 236.
(3) [1891] 2 Ch. 243.
(4) 1 Drew. 642.
(5) 2 J. & H. 615.

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have been relied on by the learned counsel for the Appellant, and they seem to me to lead to the conclusion that this case does come within the class of cases, the first of which is *Clark* v. *Taylor* (1), decided forty years ago, but which has been followed often since, and that there is really no authority in any way conflicting with that series of decisions. Certainly on principle they seem to me to be sound; and I do not think it would be in accordance with sound principle to hold or that any prior decisions necessitate our holding, where the conclusion is once arrived at that the main object of the testator or testatrix was to benefit a particular institution, that that was not of the essence of the bequest and that if that institution has ceased to exist the charitable legacy ought still to be held as effectual, and the money to be applied by the Court on the *cy-près* principle.

For these reasons, I think the appeal should be dismissed with costs.

LINDLEY, L.J.:—

I think the result at which Mr. Justice *Chitty* has arrived is right. I have attended to and followed the arguments both of Mr. *Cozens-Hardy* and of Mr. *Ingle Joyce*, and in a great many of those arguments I concur. I think, with Mr. *Joyce*, that it does not do to approach a will of this kind by a short cut by saying there is a lapse, and there is an end of it. It is begging the question whether there is a lapse or not. You must construe the will and see what the real object of the language which you have to interpret is. I will not read the words of this gift again; I have read them very often, and studied them with care. I cannot arrive at the conclusion at which the Appellant's counsel ask me to arrive, that this is in substance and in truth a bequest of £5000 for the education of the priests in the diocese of *Westminster*. I do not think it is. It is a gift of £5000 to a particular seminary for the purposes thereof, and I do not think it is possible to get out of that. I think the context shews it. I refer to the masses, the choice of candidates, and so on. If once you get thus far the question arises, Does that seminary

(1) 1 Drew. 642.

exist? The answer is, It does not. Then you arrive at the result that there is a lapse; and if there is a lapse, is there anything in the doctrine of *cy-près* to prevent the ordinary doctrine of lapse from applying? I think not. Once you arrive at the conclusion that there is a lapse, then all the authorities which are of any value shew that the residuary legatee takes the lapsed gift. We are asked to overrule that doctrine, laid down by Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1) and followed in *Fisk* v. *Attorney-General* (2). I think that the doctrine is perfectly right. There may be a difficulty in arriving at the conclusion that there is a lapse. But when once you arrive at the conclusion that a gift to a particular seminary or institution, or whatever you may call it, is "for the purposes thereof," and for no other purpose—if you once get to that, and it is proved that that institution or seminary, or whatever it is, has ceased to exist in the lifetime of the testator, you are driven to arrive at the conclusion that there is a lapse, and then the doctrine of *cy-près* is inapplicable. That is in accordance with the law, and in accordance with all the cases that can be cited. I quite agree that in coming to that conclusion you have to consider whether the mode of attaining the object is only machinery, or whether the mode is not the substance of the gift. Here it appears to me the gift to the seminary is the substance of the whole thing. It is the object of the testator. I think that is plain from the language used.

Those are the short grounds of my judgment. I do not comment upon the decisions, because the Lord Chancellor has done that sufficiently.

A. L. SMITH, L.J.:—

I have nothing material to add. In investigating whether Mr. Justice *Chitty's* judgment is correct, the first point we must make up our minds upon is this—whether he is right upon the construction he puts upon this bequest, which is, that it is a gift to a particular institution for the purposes of that institution. That is the construction which he has placed on the bequest which is now under consideration. The Lord Chancellor

(1) 1 Drew. 642. (2) Law Rep. 4 Eq. 521.

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and Lord Justice *Lindley* have dealt with the considerations as to whether that is correct or not. I entirely agree with what has been said by them. In my opinion, this is a bequest to a particular institution, for the purpose of that institution, and it is not correct to say that it is a bequest to concrete priests generally in *Westminster*. When once this is arrived at, the cases cited by Mr. *Cozens-Hardy* and Mr. *Ingle Joyce* seem to me to be all one way. They begin with the judgment of Vice-Chancellor *Kindersley* in *Clark* v. *Taylor* (1), as explained by the Lord Chancellor, followed by Vice-Chancellor *Wood* in *Fisk* v. *Attorney-General* (2), and then by Mr Justice *Pearson* in *In re Ovey* (3). I am not saying that *In re Ovey* is a decision, but one sees how he deals with the law relating to *cy-près* upon a bequest like this; then comes the case of *Biscoe* v. *Jackson* (4), where Lord Justice *Cotton* and Lord Justice *Lindley* also deal with the principles of the law; and it seems to me from *Clark* v. *Taylor* down to that case the authorities are all in sequence upon this point.

I am therefore of opinion that Mr. Justice *Chitty* being right in the construction he put on the bequest and being also right as to the law, this appeal must be dismissed.

Solicitors: *Frank Richardson & Sadler: Witham, Lambert & Roskell; Hare & Co.*

(1) 1 Drew. 642.
(2) Law Rep. 4 Eq. 521.
(3) 29 Ch. D. 560.
(4) 35 Ch. D. 460.

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[00214 of 1893.]

Estoppel—Judgment by Consent—Action for Instalment under Agreement—Denial of Agreement—Effect of Judgment as to establishing Agreement—Company—Winding-up—Proof of Debt.

A judgment by consent, or default, is as effective as an estoppel between the parties as a judgment whereby the Court exercises its mind on a contested case.

An action was brought against a company to recover an instalment of a debt alleged to be due under an agreement, the existence of which was denied by the company:—

Held (affirming the decision of *Vaughan Williams, J.J.*, that judgment by consent for the Plaintiffs precluded the liquidator in the winding-up of the company from denying the existence of the agreement on a proof being sent in for the total amount due under the agreement.

Jenkins v. *Robertson* (1) distinguished.

IN 1891 *C. de Murrieta & Co.* owed the *Bank of England* £514,800. From September, 1891, to February, 1892, negotiations took place which, as alleged by the Bank, resulted in an agreement between the Bank and the *South American and Mexican Company, Limited*, by which the company agreed to take over the debt and pay it to the Bank (by four instalments, three of which were of £100,000 each, payable in December, 1891, and June and December, 1892, the remaining instalment being the balance of the debt, which was to be paid in June, 1893), together with interest at bank rate, but not under £4 per cent.

During the months of January, February, and March, 1892, the company paid the Bank sums amounting to the first instalment of £100,000.

Shortly before the date on which the second instalment became due (30th of June, 1892) the company intimated to the Bank that they did not intend to carry out the alleged agreement or to pay the £100,000, and on the 1st of July, 1892, an action of the *Governor and Company of the Bank of England* v. *South American and Mexican Company Limited* (1892 B. 3089) was commenced in

(1) Law Rep. 1 H. L., Sc. 117.

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the Queen's Bench Division. By their statement of claim the Plaintiffs alleged (par. 1) that the Defendants were "indebted to the Plaintiffs in the sum of £100,000, being the second instalment of a sum of £514,300 agreed to be paid by the Defendants to the Plaintiffs, the said second instalment being payable on the 30th of June, 1892, the first instalment of £100,000 having been duly paid by the Defendants to the Plaintiffs," as above mentioned; (par. 2) that "it was part of the same agreement that the Defendants should pay interest at bank rate, but not under 4 per cent. per annum."

The statement of claim, after referring to particulars of the agreement delivered with the claim, concluded with a claim by the Plaintiffs for £100,000, and interest from the date of the writ until payment or judgment. The particulars delivered with the statement of claim were headed "Particulars of the agreement alleged in the statement of claim," and they stated as follows: "The agreement mentioned in paragraph 1 of the statement of claim was negotiated and made in and between the months of October, November, and December, 1891, and in January, 1892, and was confirmed or renewed on or about the 8th of February, 1892. It was partly in writing and partly verbal, and was made between the governor of the *Bank of England* acting on behalf of the Plaintiffs, and *H. F. Pollock* acting on the part of the Defendants. The writings leading up to and confirming the agreement were as follows:— [The names of the writers and recipients, and the dates of the letters, were here set out]. The interviews between the governor and *H. F. Pollock* were on numerous occasions in and between the months of October, 1891, and January, 1892, the dates whereof cannot be more particularly given. There was a further interview on the 8th of February, 1892, between the governor and *H. F. Pollock* and between Mr. *May*, the chief cashier, on behalf of the Plaintiffs, and *H. F. Pollock*, at which the following documents were discussed—draft form of promissory note; draft letter (*Murrieta & Co.* to the governor)."

By their statement of defence (par. 1) the company denied, for the reasons thereinafter stated, that they were indebted to the Plaintiffs in any sum whatever. Par. 2 was as follows: "The Defendants deny the alleged agreement mentioned in the state-

ment of claim. There never was any such or any agreement between the Plaintiffs and the Defendants." By par. 3 the company said there were negotiations between themselves and the Plaintiffs, and that there never was any concluded or binding agreement between them; that the sums making up the first instalment of £100,000 were paid in contemplation of and with a view to a proposed agreement which was never concluded, and subject to the amalgamation thereinafter mentioned and not otherwise; and that part of such instalment was paid by certain guarantors after the company had disputed the right of the Plaintiffs to receive the same, and had protested against the payment. By par 1 the company said that if there ever was any agreement—which the company wholly denied—it was conditional upon a proposed amalgamation between *C. de Murrieta & Co.* and the company being successfully carried through and completed; that such amalgamation never was successfully carried through or completed; and that the alleged agreement never became binding, or operative, or in force. By par. 5 the company said they never authorized any person to make the alleged agreement on their behalf, except subject to the amalgamation being successfully carried through and completed; and by par. 6 they set up sect. 4 of the *Statute of Frauds* (29 Car. 2, c. 3).

And by way of counter-claim and set-off the Defendants said as follows:—

"1. The Plaintiffs are indebted to the Defendants in the sum of £100,000 for moneys had and received by the Plaintiffs for the use of the Defendants, the said sum being the moneys mentioned in the claim, and having been paid by the Defendants under the circumstances stated in par. 3, and conditionally only, and the consideration for such payments having wholly failed.

"2. The Defendants claim £100,000."

By their reply the Plaintiffs joined issue on the defence, and, as to the counter-claim, said that the sum of £100,000 was paid in part performance of the agreement, and without any condition or agreement, express or implied, to repay the same. The action was being tried before Mr. Justice *Kennedy*, when, after some evidence had been given on behalf of the Plaintiffs, Mr.

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Finlay, Q.C., one of the Plaintiffs' counsel, said: "The right of the Bank to recover in this action being admitted, judgment has been taken upon terms which need not be mentioned. The *Bank of England* felt that it was their duty to establish their right to recover . . . the terms have been agreed upon between the parties."

Sir *Horace Davey*, Q.C., one of the Defendants' counsel, said: "I think I ought to say that my clients, as a matter of business, and for reasons with which I need not trouble your Lordship, have now compromised this action upon terms which are satisfactory to the Bank and to my clients; but it must not be supposed that, if the case had gone on, I should have acquiesced in the view of the case presented by my learned friend."

The judgment as drawn up and entered (on the 30th of June, 1893) was as follows:—

"This action having on the 29th and 30th days of June, 1893, been tried before the Honourable Mr. Justice *Kennedy*, without a jury (by consent), in the City of *London*, and the said Honourable Mr. Justice *Kennedy*, on the said 30th day of June, 1893, having by consent ordered that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and dismissed the counter-claim with costs; and the said Judge having also ordered, by consent, that execution should be stayed except as to costs, and that if, within three weeks from the said 30th day of June, 1893, the sum of £60,000 were paid to the Plaintiffs, or £20,000 were paid and £40,000 secured by the promissory note [as therein mentioned], the Plaintiffs should accept it (when such promissory note was duly paid) as in full discharge of all claim on the Defendants; and the said Judge having also ordered, by the like consent, that the Plaintiffs should realize the securities in the best interests of all concerned, and should account for the surplus, if any, to the parties entitled; and the said Judge having also ordered, by the like consent, that if the said sum of £20,000 should not be paid, and the said sum of £40,000 secured in the manner provided within three weeks from the said 20th day of June, 1893, as hereinbefore mentioned, or if the said promissory note should not be paid at the due date, then, in either of such cases, the Plaintiffs should be at liberty

to issue execution for the full amount of the judgment debt, after giving credit for any moneys (other than costs) previously paid under the now reciting order, and to enforce the payment of the further instalments claimed by them under the Plaintiffs' agreement with the Defendants, set out in the statement of claim in this action—It is this day adjudged that the Plaintiffs recover from the Defendants £100,000 and costs, to be taxed, and that the Defendants' counter-claim be dismissed, with costs to be taxed."

No part of the £60,000 mentioned in the judgment was paid, and on the 2nd of August, 1893, the company was ordered to be wound up by the Court. In the winding-up the Bank claimed to prove for the sum of £401,592 5*s.* 5*d.* (being the above-mentioned sum of £514,300, less the first instalment of £100,000 and the sum of £12,707 received as interest on securities held by the Bank), and interest from the 9th of January, 1892. In the affidavit in support of the claim the total value of the securities was estimated at £170,000.

The Official Receiver and Liquidator rejected the proof, substantially on the same grounds as those alleged as a defence to the action, and his notice of rejection of proof also stated "that under the circumstances the company is not bound by the judgment dated the 30th of June, 1893."

The Bank took out a summons asking that the decision of the Official Receiver and Liquidator rejecting the proof might be reversed, and that the proof might be admitted in whole. The summons was adjourned into Court and heard before Mr. Justice *Vaughan Williams* on the 19th and 20th of July, 1894.

It was conceded during the argument that the Bank were entitled to prove for the second instalment of £100,000.

Finlay, Q.C., *Greene*, Q.C., *R. M. Bray*, and *Howard Wright*, for the *Bank of England*:—

All the grounds relied on by the Respondents in support of his rejection of the proof were raised in the action; the existence of the agreement was denied, and put in issue by the defence and counter-claim. The judgment precludes the Respondents from denying that the agreement was binding on the company.

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The judgment embodied a compromise between the parties to the action which was a mutual arrangement that each party should give up something claimed by such party; but it clearly involved the proposition that the agreement existed. The question whether it existed or not was one which the parties came prepared to contest in the action; and a judgment on it, though by consent, is quite as conclusive as if it had been pronounced by the Court after the action had been fought out: *In re Flatau* (1); *Flitters* v. *Allfrey* (2).

[They were stopped by the Court.]

Moulton, Q.C., and *George Lawrence*, for the Official Receiver and Liquidator:—

There was no *res judicata* at all. The judgment was a mere bargain between the parties, whereby, if the company paid £20,000 and paid or found security for the balance of £60,000, the rest of the claim, not only as to the £100,000, but as to everything under the agreement, was to be abandoned; but if the money was not paid and secured as agreed, the Bank were to have judgment for the £100,000, and were to take whatever proceedings they thought proper with regard to the rest of their claims. But there was no bargain in that case as to the rest of such claims.

The Court never exercised its mind on the question raised by the pleadings, and the company are not estopped from raising the question in other proceedings.

[VAUGHAN WILLIAMS, J.:—*Newington* v. *Levy* (3) clearly establishes that there may be estoppel by judgment without the mind of the Court having been exercised.]

That was not a case of estoppel by *res judicata*; it was estoppel by action. There was no judgment in this case on any particular issue—that is to say, as to rights or *status*. The observations of counsel at the trial shew that it was not intended that any liability on the agreement should be admitted.

With reference to the instalments beyond the one sued for, the Plaintiffs were relegated to their original claim.

(1) [1893] 2 Q. B. 219. (2) Law Rep. 10 C. P. 29.
(3) Law Rep. 6 C. P. 180.

A judgment by agreement does not have the same effect, as regards the *res adjudicata*, as a judgment not by consent—for instance, where a claim for a declaration as to a right of way is compromised, the public are not precluded from again raising the question: *Jenkins* v. *Robertson* (1). The question there was, What makes a thing *res judicata*? Where the Court acts, not in a judicial, but in an administrative manner, as by registering a bargain, there is no *res judicata*. Judgment by default for a sum of money is conclusive as to that sum, but not as to the facts alleged in support of the claim for it.

[VAUGHAN WILLIAMS, J., referred to *Howlett* v. *Tarte* (2).]

A judgment is conclusive, not only with reference to the actual matter decided, but also with reference to the grounds of the decision—but only as to such grounds if they can be clearly discovered from the judgment: *Alison's Case* (3). In this case it is impossible to say that the Court arrived at a decision on any ground. Although judgment directly upon a point is conclusive upon the same matter, between the same parties, coming incidentally in question in another Court for a different purpose, the judgment is not conclusive evidence of any matter which came collaterally in question, or of any matter incidentally cognizable, or to be inferred by argument from the judgment: *Reg.* v. *Hutchings* (4). In order to make out that there is a good estoppel, the plea must shew that the point relied on as a defence was in the former proceeding decided against the plaintiff: *Carter* v. *James* (5).

Finlay, in reply:—

In *Carter* v. *James*, "the attention of the Court . . . . was not called to the effect of the admission by pleading over in the former action, the verdict on the issue having been found against the plaintiff, and a protestation being therefore ineffectual to prevent his being bound by the admission implied from pleading over": *Smith's* Leading Cases (6). It is true that there was an agreement at the trial, but what was agreed was

(1) Law Rep. 1 H. L., Sc. 117.
(2) 10 C. B. (N S.) 813.
(3) Law Rep. 9 Ch. 1, 25.
(4) 6 Q. B. D. 300, 304.
(5) 13 M. & W. 137.
(6) 9th Ed. vol. ii. p. 847.

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that judgment should be entered for the £100,000 claimed, and that the counter-claim should be dismissed. If it had not been intended that the agreement itself, on which the claim to the instalment was based, should be established, the course adopted would have been to withdraw the record, on the terms of the Defendants paying the Plaintiffs £100,000, and of there being a Judge's order if necessary. In *Alison's Case* (1) the difficulty arose from the judgment in the former case not in form stating on which plea the defendant was to succeed, but only stating that the plaintiffs were not entitled to recover any portion of the sum they claimed. *Jenkins* v. *Robertson* (2) has no application to the present case. In *Scotland* it is competent for any member of the public to bring an action of declarator to establish a public right, and if it is fully and fairly tried, the public are bound by the judgment. All that the House of Lords decided was, that if the pursuer compromises the action for some consideration to himself the public are not precluded from raising the question again.

Vaughan Williams, J.:—

I am of opinion that my decision must be in favour of the *Bank of England* and against the Official Receiver. My only reason for hesitating to come to such a decision has been that I could see so little ground for doubt in the matter that I was afraid I must be overlooking something; but I must now give judgment according to my own view of the matter.

Two questions arise. One question is, What would be the effect of this judgment, as an estoppel between the same parties, if the decision had been arrived at in the ordinary way, and not by consent? The other question is, whether it makes any difference that in this case the judgment was a judgment by consent. I will deal with the second question first, and as to that point I am of opinion that the fact that the judgment was by consent makes no difference whatsoever. It is quite true, of course, that a judgment by consent is based on agreement between the parties, and, if the judgment has not been drawn up in accordance with the agreement between the parties, that is,

(1) Law Rep. 1 Ch. 1, 25. (2) Law Rep. 1 H. L., Sc. 117.

at any time, a sufficient ground for altering the judgment and modifying it so as to make it accord with the agreement. It was said that the proper way of getting that done was by some motion or proceeding to reform or set aside the judgment. Generally, that would be so. But I do not know whether, in an action between the Official Receiver and Liquidator, who represents the creditors of the company, and the *Bank of England*, who were the Plaintiffs in the action, I should think it necessary to put the Official Receiver to resort to any such roundabout method. Very likely it would have been the proper course, as he represents the creditors, to let him go behind the judgment, and rely upon the agreement which was the basis of it, if such agreement and the judgment differed at all; but I need not decide that question, because it is not suggested here that the judgment has been drawn up otherwise than in accordance with the agreement. Indeed, it could not be so suggested, because here is the original of the memorandum which was signed by the counsel engaged in the action—Mr. *Finlay*, for the *Bank of England*, and Sir *Horace Davey*, for the *South American and Mexican Company*—and the judgment admittedly follows the memorandum.

Under these circumstances I have only to consider, with reference to the second question, Mr. *Moulton's* suggestion, that a judgment by consent, upon which the Court has not exercised its mind, does not and cannot raise an estoppel *inter partes*. I can only say this is the first time I have ever heard such a proposition suggested. It has always been the law that a judgment by consent or by default raises an estoppel just in the same way as a judgment after the Court has exercised a judicial discretion in the matter. The basis of the estoppel is that, when parties have once litigated a matter, it is in the interest of the estate that litigation should come to an end; and if they agree upon a result, or upon a verdict, or upon a judgment, or upon a verdict and judgment, as the case may be, an estoppel is raised as to all the matters in respect of which an estoppel would have been raised by judgment if the case had been fought out to the bitter end.

The only one of the authorities cited to me to which I need refer is *Jenkins* v. *Robertson* (1); and I have only to say, with

(1) Law Rep. 1 H. L., Sc. 117.

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regard to that case, that it is no decision whatever upon the general law. The action was an action in which, according to the law of *Scotland*, one person is allowed, if he chooses, to represent the public: and apparently, according to the law of *Scotland*, the result of that action binds the public at large. All that the House of Lords decided was that such a result would not bind the public at large unless it was a result arrived at after judicial consideration, and that it would not bind the public if it was a result arrived at by consent, and *à fortiori* if such consent was a purchased consent. The decision does not seem to me to touch this matter at all.

Under these circumstances I have come to the conclusion that I must treat the judgment, in the action brought by the *Bank of England* against the company, although it was a judgment by consent, as being binding upon the parties to that action in just the same way as if it had been a judgment arrived at after the case had been fought out.

That being so, the only other question I have to consider is, In respect of what matters is this judgment conclusive? The action was brought to recover a sum of £100,000, the second instalment of a debt of £514,300 alleged by the statement of claim to have been agreed to be paid by the Defendants to the Plaintiffs at certain specified dates. Now, the identity of the agreement is established by the particulars which were delivered with the statement of claim. It seems to me perfectly impossible that the Plaintiffs could have recovered in that action without establishing that agreement.

The judgment, so far as it appears material, was as follows: "This action having . . . been tried before . . . Mr. Justice *Kennedy* without a jury (by consent) . . . and the said . . . Mr. Justice *Kennedy* . . . having by consent ordered that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and dismissed the counter-claim with costs; and the said Judge having also ordered, by consent, that execution should be stayed, except as to costs, and that if, within three weeks from the . . . 30th of June, 1893, the sum of £60,000 were paid . . . the Plaintiffs should accept it . . . as in full discharge of all claim on the Defendants . . . It is . . . adjudged

that the Plaintiffs recover from the Defendants £100,000, and costs to be taxed . . . And that the Defendants' counter-claim be dismissed, with costs to be taxed."

Now, that seems to me to be a judgment for the £100,000 claimed in the statement of claim. I should have had no doubt as to that matter even if there had been no counter-claim, but the way in which the counter-claim is dealt with makes it all the more clear that the £100,000 mentioned in the judgment is the £100,000 claimed under the same agreement, the non-existence of which was the basis of the counter-claim. It is quite plain what was done in this action. The Plaintiffs alleged the existence of an agreement, and claimed £100,000 as an instalment under it. The Defendants said . "No such agreement existed. We, it is true, have paid you £100,000 under that agreement—the first instalment, as it was supposed to be—but there never was an agreement, and, therefore, you ought to pay us that £100,000 back again." That being so, the judgment quite plainly means that there was such an agreement, and, therefore, that there was to be judgment for the £100,000 claimed by the Plaintiffs, and that the counter-claim—which was for a return of the first instalment of £100,000, and was based on the non-existence of the agreement—failed.

Under these circumstances it seems to me abundantly clear that the existence of this particular agreement was of the essence of the Plaintiffs' claim in the action, and that it was impossible for the Plaintiffs to recover the instalment of £100,000 in the action unless the agreement alleged in the statement of claim existed. And Mr. *Moulton* did not deny that, if the judgment was a judgment for the particular £100,000 claimed in the statement of claim, the proof of the existence of the agreement would be essential to that judgment. But it was suggested that the putting in of the £100,000, the same figure as that claimed in respect of the instalment, was a mere accident, and that it really was not intended that any judgment should be taken on the claim in the statement of claim, but that what was intended was that there should be an amount payable by the Defendants to the Plaintiffs, not under the claim, not recoverable in respect of the claim, but an amount to secure which the parties

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had agreed that the pending action should be utilized as machinery.

All that I can say is, that if that was the intention of the parties, there was a very simple mode of carrying it out, which was not adopted by the parties. I hold that the judgment on the claim is a judgment for the £100,000 under the agreement alleged in the pleadings, and that the judgment, therefore, affirms the existence of the agreement, and that the judgment for the Plaintiffs on the counter-claim also affirms the existence of the agreement.

Under these circumstances it seems to me that on the application before me the Official Receiver cannot be allowed to question the claim of the *Bank of England*. Therefore, I shall give judgment accordingly. The decision of the Official Receiver must be reversed, and the proof must be admitted in the whole, with costs, but without prejudice to liberty to the Official Receiver to apply, if he wishes, to raise any question of mere account.

F. E.

From this judgment the Official Receiver and Liquidator appealed. The appeal was heard on the 6th of November, 1894.

Moulton, Q.C., and *George Lawrence*, for the Appellant, referred to *Jenkins* v. *Robertson* (1).

Finlay, Q.C., *Greene*, Q.C., *R. M. Bray*, and *Howard Wright*, for the *Bank of England*, were not called on.

LORD HERSCHELL, L.C.:—

I think that the judgment of the learned Judge below in this case was right. An action had been brought by the Respondents against the *South American Company* claiming a sum of £100,000 as the second instalment of a larger sum agreed to be paid by the Defendants to the Plaintiffs. There was a counter-claim to recover back the sum paid as the first instalment, alleging that the agreement was only inchoate, or that it was conditional, and that the condition had not been performed.

(1) Law Rep. 1 H. L., Sc. 117.

The case was partly tried, and thereupon, by consent of the parties, an order was made that judgment should be entered for the Plaintiffs on the claim for £100,000 and costs, and that the counter-claim should be dismissed with costs. Now, it seems to me that a judgment for the Plaintiffs on the claim was not a judgment for them for a sum of £100,000 at large; it was a judgment for them on a claim of £100,000, being part of a debt due, namely, the second instalment. Then it was further ordered that execution should be stayed, and that if within three weeks £60,000 should be paid, £20,000 in cash and £40,000 by a promissory note, and if the promissory note was duly paid, that £60,000 should be taken in satisfaction of all claims—that is to say, all claims by the Plaintiffs under the agreement. Then it is further ordered that if the promissory note is not paid—and that was the event which happened—they should be at liberty to issue execution for the full amount of the judgment debt, and to enforce the payment of the further instalments claimed by them under the Plaintiffs' agreement with the Defendants. Although it is said that those words "under the agreement with the Defendants" do not appear in the minute signed by counsel, at all events the words appear that they shall be at liberty to enforce further instalments. Now, what is the meaning of that? It is said that, notwithstanding that agreement to give judgment for the claim, it was open to the Defendants to make default in paying the £60,000, and then to say, "As regards all but this one instalment, for which you have got judgment, the matter is at large; you have got judgment as for an instalment of a debt in respect of which you sue; but we are to be at liberty now to say there never was a debt at all; we cannot undo this £100,000, but we may dispute our liability to anything further." I do not think that is the meaning fairly to be gathered from the settlement arrived at or the order of the Judge. I do not think the fair meaning is that they were to be at liberty afterwards to dispute the existence of any debt at all, which is the present claim. It is to be observed that what the Plaintiffs are to be at liberty to enforce is further instalments. What is the meaning of that? Instalments of that debt the existence of which is recognised, and

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which is the basis of the judgment—that debt in respect of which judgment is then given for the instalment then due. It means "If we do not carry out our present arrangement with you you are to be at liberty to enforce payment of these further instalments"—not merely, as it seems to me, "You are to be at liberty then to take proceedings for payment of those further instalments or claims; and we are to be at liberty to insist that there never was any debt, and there never ought to have been any judgment, and that, therefore, there are no instalments due." I do not think that is the fair construction or the fair effect of an arrangement of this sort, where a judgment is given by consent. The truth is, a judgment by consent is intended to put a stop to litigation between the parties just as much as is a judgment which results from the decision of the Court after the matter has been fought out to the end. And I think it would be very mischievous if one were not to give a fair and reasonable interpretation to such judgments, and were to allow questions that were really involved in the action to be fought over again in a subsequent action. I think, therefore, the judgment should be affirmed, and the appeal dismissed with costs.

LINDLEY, L.J.:—

I do not think this case is arguable in a lawyer's sense of the expression. It is impossible to read the compromise without seeing that the necessary result of it is—and I believe the intention of the parties to it was—that the dispute between them should be brought to an end. I do not say that was all, because there was the money to be paid; but to say that it is competent to any person to re-open the litigation and dispute the validity of the claim is to say that which I think no lawyer could possibly for a moment assent to.

A. L. SMITH, L.J., concurred.

Solicitors for the *Bank of England*: *Freshfields.*

Solicitors for the Official Receiver and Liquidator: *Hollams, Sons, Coward, & Hawksley.*

M. W.

PLEDGE *v.* CARR.

[1893 P. 821.]

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Mortgage—First Mortgages of different Properties to distinct Mortgagees—Second Mortgage of all Properties to one Mortgagee—Subsequent Union of First Mortgages—Redemption—Consolidation.

The owner of several houses in the years 1863–1866 executed first mortgages of them to different mortgagees for distinct sums. In 1868 he gave a second mortgage on all the houses to the Plaintiff's predecessors in title. In 1885 the second mortgage was transferred to the Plaintiff. Before 1893 all the first mortgages had become vested in the Defendants. In 1893 the Plaintiff brought an action against the Defendants to redeem two of the first mortgages upon payment of the amount due under them only.

It was held by *Romer*, J., following *Vint* v. *Padget* (1) and *Tweedale* v. *Tweedale* (2), that the Defendants were entitled to consolidate all the first mortgages.

Held, by the Court of Appeal, that *Vint* v. *Padget*, being the decision of a Court of co-ordinate jurisdiction, could not be overruled by their Lordships, and that the appeal must be dismissed.

APPEAL from Mr Justice *Romer* (3).

The facts and arguments are fully given in the report of the hearing in the Court below, and the following short statement will suffice for the purpose of the present report:—

James Banks, who was the owner of several houses, in the years 1863 1866 executed several first mortgages of them to several different mortgagees for distinct sums.

On the 20th of August, 1868, he mortgaged all these houses together by way of second mortgage to secure one sum to the Plaintiff's predecessors in title.

On the 1st of April, 1885, the second mortgage of the 20th of August, 1868, was transferred to the Plaintiff.

Before the commencement of this action all the first mortgages had become vested in the Defendants.

On the 30th of March, 1893, the Plaintiff brought this action against the Defendants, and claimed to redeem two of the first mortgages on payment of the amounts thereby secured. The

(1) 2 De G. & J. 611. (2) 23 Beav. 341.
(3) [1894] 2 Ch. 328.

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Defendants, however, claimed the right to consolidate all the first mortgages.

Under these circumstances, Mr. Justice *Romer*, following *Vint* v. *Padget* (1) and *Tweedale* v. *Tweedale* (2), held that the Defendants were entitled to consolidate their mortgages, and that the Plaintiff could not as against them redeem some of the properties included in the mortgage of the 20th of August, 1868, without redeeming all.

The Plaintiff appealed.

Bramwell Davis, for the Appellant:—

I am unable to distinguish *Vint* v. *Padget* from the present case, and if that case is to be treated as good law, and as an authority binding your Lordships, it would be fatal to the present appeal. But *Vint* v. *Padget* has been recently commented upon by the Court of Appeal in *Minter* v. *Carr* (3). It was not, it is true, necessary to decide in that case the question which arises here; but the observations made by the Court therein have thrown doubt upon the decision in *Vint* v. *Padget*, and I submit that it should not now be treated as good law.

Neville, Q.C., and *Edwin Ward* were not called upon.

LORD HERSCHELL L.C.:—

We cannot overrule *Vint* v. *Padget*, for that was the decision of a Court co-ordinate in jurisdiction with ourselves; all we can do, therefore, is to dismiss this appeal.

LINDLEY and A. L. SMITH, L.JJ., concurred.

Solicitors: *A. R. & H. Steele*, agents for *J. Minter, Folkestone; Talbot & Tasker.*

(1) 2 De G. & J. 611. (2) 23 Beav. 341.
(3) [1894] 3 Ch. 498.

W. W. K.

McILQUHAM *v.* TAYLOR.

[1894 M. 80.]

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STIRLING, J.
July 18, *Aug.* 7.
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Nov. 13.

Contract—Alternative Stipulations—Covenant to pay £1000 or to transfer £1000 worth of Shares in Company to be formed by Covenantor—Company formed with Shares of different Classes—Breach of one Alternative—Right of Covenantee to enforce the other—Shares of no marketable value.

The Defendant covenanted by deed within twelve months to pay the sum of £1000, or transfer to the Plaintiff £1000 worth of fully-paid shares, in a company to be formed by the Defendant. The Defendant formed the company with preference and ordinary shares, and, within the period named, transferred to the Plaintiff shares of the latter class of the nominal value of £1000, and purporting to be fully paid; but no contract in respect of them had been registered previous to their issue, nor were they in fact fully paid up in cash, and the Plaintiff refused to accept them. After the expiration of the twelve months a contract in respect of the shares was filed with the Registrar of Joint Stock Companies. The shares of the company were of no value, and had never been marketable.

In an action to recover the sum of £1000:—

Held, by *Stirling*, J., that the Plaintiff was not bound to accept shares in a company in which all the shareholders did not stand on a footing of equality, and that, as the Defendant had by so forming the company put it out of his power to comply with that branch of the covenant which related to the shares, he must perform the alternative and pay the £1000.

Studholme v. *Mundell* (1) followed.

Held, by the Court of Appeal, that "£1000 worth of shares" meant shares of that value in the market: and the shares transferred being of no marketable value, the judgment of *Stirling*, J., was affirmed on that ground.

THIS was an action to recover the sum of £1000 under a covenant contained in a deed dated the 2nd of December, 1892. The deed in question was an assignment of a lease (dated the 4th of April, 1889) of a certain blende mine. It was made between *John Paull* and *Griffith Williams*, in whom the lease was then vested, of the first part, the Plaintiffs *James McIlquham* and *William Michell* of the second part, and the Defendant *Henry E. Taylor* of the third part.

After a recital of an agreement by the parties of the first

(1) 1 Ld. Raym. 279.

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part to transfer the property to the Plaintiffs, the deed proceeded: "Whereas the said *H. E. Taylor* has since agreed with the said *J. McIlquham* and *W. Michell* for a transfer to him of the said lease of the 4th of April, 1889, and all the machinery and plant now being in or upon the said demised premises for the remainder of the term, subject to the payment of the rents and royalties and performance of the covenants and conditions contained therein for the sum of £2000, the sum of £1000 to be paid on the day of the date of these presents, and the sum of £1000, being the balance thereof, in fully paid-up shares in a company to be formed by the said *H. E. Taylor* for working the said mine and premises."

Then followed the assignment and the covenant in question, which was in these terms: "The said *H. E. Taylor* will within twelve calendar months from the date hereof pay the sum of £1000 to or hand over to or otherwise transfer into the names of the said *James McIlquham* and *William Michell* one thousand pounds worth of fully paid-up shares in a company to be formed by the said *H. E. Taylor*, within the said twelve months as aforesaid, for working the said mines and premises, the capital of such company not to exceed £12,000."

A company was duly formed and registered on the 20th of May, 1893. The memorandum of association stated, that amongst other objects of the company were to be the carrying out of the deed of assignment of the 2nd of December, 1892, and the acquiring by purchase of the lease of the mine in question. Clause 5 of the memorandum stated that the capital of the company was £12,000, divided into 1200 shares of £10 each, of which 600 were thereby declared to be A shares with £10 per cent. per annum preference, and 600 to be ordinary or B shares. The articles of the company provided that the company should as speedily as possible after incorporation enter into an agreement with *H. E. Taylor* to allot to him, credited as fully paid up, 600 B shares of the company to the nominal amount of £6000, and the sum of £4000 in cash, or 400 A shares of the company, also credited as fully paid-up, to the nominal amount of £4000, as the purchase-money for the said property.

Shortly after the incorporation of the company 100 B shares

expressed to be fully paid up were allotted to the Defendant; and on the 23rd of November, 1893, he executed a transfer of these 100 shares to the Plaintiffs. At that time no contract had been registered in respect of them under sect. 25 of the *Companies Act*, 1867. Such a contract, however, was, on the 16th of June, 1891, filed with the Registrar of Joint Stock Companies, so that it was now possible for the Defendant to transfer to the Plaintiffs fully paid shares in the company. It was proved that the shares of the company had never had any marketable value. Under these circumstances the Plaintiffs declined to accept a transfer of 100 B shares, and claimed payment of £1000 in cash.

The action was heard before Mr. Justice *Stirling* on the 13th of July, 1894.

Grosvenor Woods, Q.C., and *Griffith Jones*, for the Plaintiffs:—

Where there is a contract to perform some act, or in the alternative pay a sum of money, then if the act is not performed the sum of money is payable: *Doverdll* v *Burnell* (1).

[STIRLING, J.:—Is not the rule of law that where there is an alternative the measure of damages for breach of the contract is that which is least burdensome to the covenantor?]

That is the general rule; but not where the alternative is the payment of a certain sum of money: *Leake* on Contracts (2).

The twelve months having elapsed, the Defendant cannot now gives us the shares, and he is bound therefore to pay the money: *Barkworth* v. *Young* (3). The Defendant has disabled himself from carrying out the branch of the covenant relating to the shares by the way in which he has formed the company: *Hutton* v. *Scarborough Cliff Hotel Company* (4).

[STIRLING, J.:—Is that any longer law? It has been severely shaken in a recent decision.]

The Defendant cannot tender us shares which we are bound to accept. The shares were issued before the registration of a contract as required by sect. 25 of the Act of 1867; the covenant

(1) Law Rep. 8 C. P. 475.
(2) 3rd Ed. pp. 588, 589.
(3) 4 Drew. 1, 25.
(4) 2 Dr. & Sm. 521.

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to transfer fully paid shares has not therefore been satisfied, and the Plaintiffs could not safely take them as fully paid shares even after registration of a contract: *Oeregum Gold Mining Company of India* v. *Roper* (1).

Hastings, Q.C., and *Bramwell Davis*, for the Defendant:—

The contract is plainly an alternative one, and the construction depends upon which branch of the alternative is put first. In *Deverill* v. *Burnell* (2) the contract was to deliver the bills or pay the value, and the learned Judge said that if it had been put the other way the case would not have been arguable. Here it is to pay £1000 or transfer the shares, and the contract would be satisfied by the performance of either. That being so, the Plaintiffs are only entitled to damages in respect of that branch of the alternative which is least burdensome to the Defendant: *Cockburn* v. *Alexander* (3). At the time for the performance of the contract the shares had no value, and consequently the Plaintiffs are entitled to nothing more than nominal damages.

There is no stipulation in the contract that the shares shall be all of the same value. If the company had been already formed with *A.* and *B.* shares, the covenant would have been satisfied by the transfer of shares of either class.

Grosvenor Woods, in reply:—

On the construction of the covenant it is clear that the Plaintiffs were either to have £1000 or £1000 worth of shares. There is no authority that in a case of this kind the covenantor is at liberty to elect to perform the alternative which is most favourable to himself.

[Stirling, J., referred to *Robinson* v. *Robinson* (4).]

The £1000 was meant to represent the equivalent in value of the shares. The Defendant is not entitled to elect to give us shares, and then say, "I do not transfer them, and you are only entitled to damages on that footing. Where there is a contract

(1) [1892] A. C. 125.
(2) Law Rep. 8 C. P. 475.
(3) 6 C. B. 791.
(4) 1 D. M. & G. 247.

to perform something which is impossible, and in the alternative something which is possible, then that which is possible must be performed. In the absence of any agreement to the contrary, if *A.* agrees with *B.* to form a company and give him shares in it, *A.* is bound to form his company with shares of equal value and give *B.* some of such shares: *Hutton* v. *Scarborough Cliff Hotel Company* (1).

These shares were not validly issued: *In re Eddystone Marine Insurance Company* (2); *Bland's Case* (3); and we cannot be forced to take them. Registration of a contract would not now protect us as holders. In any event, we are entitled to £1000 as the measure of damages for the breach of the covenant.

Hastings:—

Those authorities only go to this, that where a contract with a company is manifestly a sham, there being no real consideration, it cannot be validated by registration under sect. 25 of the Act of 1867. That does not apply here.

1894. Aug. 7. STIRLING, J. (after stating the facts, and observing that there had been a breach of the covenant to transfer £1000 worth of fully paid shares within twelve calendar months of the date of the deed, continued):—

Under these circumstances it was contended that the contract was to hand over or transfer to the Plaintiffs the shares described in the covenant, or in default to pay £1000, and it was said that, in consequence of default made by the Defendant, the £1000 is now payable. In support of that contention the case of *Deverill* v. *Burnell* (4) was cited. For the Defendant it was argued that the covenant is to perform one of two alternatives—either within twelve months to pay £1000 or to transfer the shares; that the result of the breach is that the Defendant has become liable to pay damages, but that such damages are to be assessed on the footing that the Defendant is entitled to select for performance that alternative which is the least burdensome to him. In support of that contention two cases were cited: *Cockburn* v.

(1) 2 Dr. & Sm. 521.
(2) [1893] 3 Ch. 9.
(3) [1893] 2 Ch. 612.
(4) Law Rep. 8 C. P. 475.

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Alexander (1) and *Robinson* v. *Robinson* (2), and it was said that, the shares being worthless, the Plaintiffs are entitled to nominal damages only. To this it was answered, that the Defendant has put it out of his power to perform the one branch of the covenant by forming the company with its capital divided into preference and ordinary shares, and that, even if the covenant be alternative, he must, under the circumstances, perform that branch of it which provides for payment in cash. I have come to the conclusion that the Plaintiffs are right in that contention, and it is consequently unnecessary to say what, in my view, is the strict construction of the covenant. I think that the shares which the Defendant undertook to transfer were to be shares in a company in which the shareholders all stood on a footing of equality. If the case were one of partnership, it would come within the *Partnership Act*, 1890, which provides, in sect. 2, sub-sect. 1, in accordance with the law as it was before the Act, that, subject to any agreement express or implied between the partners, all the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm. Therefore partners, in the absence of express stipulation, stand on an equal footing. In the same way, upon an agreement for a partnership, if the shares are not defined, the partners must come in on equal terms. As regards the position of shareholders in a company, as to whom nothing is said as to their rights *inter se*, the law may not be in a very settled state. The point was referred to in the House of Lords in *British and American Trustee and Finance Corporation* v. *Couper* (3). Lord *Macnaghten* there says: "In the case of *Hutton* v. *Scarborough Cliff Hotel Company* (4), the company's memorandum of association declared that the capital was divided into a certain number of shares. There was nothing in the memorandum or in the articles to indicate that the shares might be of different classes. The directors found that they could not issue the whole as ordinary shares. A special resolution was passed authorizing the directors to issue a certain number as preference shares. The proposed issue was

(1) 6 C. B. 791.
(2) 1 D. M. & G. 247.
(3) [1894] A. C. 399, 416.
(4) 2 Dr. & Sm. 521.

restrained at the suit of an ordinary shareholder, on the ground mainly that, although the company had passed a special resolution authorizing the issue of preference shares, they had not in terms altered one of the original articles which provided for equality among shareholders in respect of dividends. The company then passed a special resolution altering the obnoxious article. They were again met by an application for an injunction, and the injunction was granted by Vice-Chancellor *Kindersley* on the ground that there was an implied stipulation in the memorandum of association that all the shareholders should stand on an equal footing as to the receipt of dividends, and that what was proposed to be done was 'contrary to the very nature of a joint stock company,' and was 'an alteration in the constitution of the company.' It is difficult to understand what the learned Vice-Chancellor meant by the expression 'constitution of the company,' and it is difficult to deal with an argument resting on a phrase so vague. Nor is it easy to understand the Vice-Chancellor's view, that equality among shareholders in respect of dividends was an 'implied stipulation in the memorandum.' There is nothing in the Act of 1862, or in any other Act, requiring the memorandum to contain any reference to the rights of shareholders *inter se*. The division of the capital into shares of a certain fixed amount which must appear in the memorandum would not be altered or affected by issuing some of the shares as preference shares. The practical result of the decision has been that, except in cases coming within the rule laid down in *Harrison* v. *Mexican Railway Company* (1)—a decision which has not met with universal acceptance—no company limited by shares that has not taken power by its memorandum to issue preference shares has been able to raise additional capital in the manner most advantageous to its shareholders and its creditors. It seems to me that the decision in *Hutton* v. *Scarborough Cliff Hotel Company* (2) was not founded upon a sound view of the *Companies Act*, 1862, and I respectfully dissent from it. I have the less hesitation in expressing this view because I find that Lord Justice *Cotton* has disapproved of the chief ground on which the decision was based. 'In reality,' he says, in *Guinness* v. *Land*

(1) Law Rep. 19 Eq. 358. (2) 2 Dr. & Sm. 521.

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Corporation of Ireland (1), 'it is not by implication from the construction of the memorandum that the equality of the shareholders as regards dividends arises, but by the implication which the law raises as between partners, unless their contract has provided the contrary.' Lord Justice *Lindley*, in a later case (2), takes the same view. I agree that the equality of shareholders as regards dividends is not an implied condition of the memorandum. But I doubt whether it is necessary to have recourse to the doctrines of partnership. It seems to me that if the sum of the interests of persons concerned in a joint adventure is divided into shares of equal amount distinguished by numbers for the purpose of identification, but with no other distinction between them, express or implied, it follows as a self-evident proposition that the interests of the shareholders in respect of their shares as regards dividend and everything else must be equal."

The law, then, is that under an ordinary memorandum of association, according to which the capital of a company is divided into shares of equal amount, the interests of the shareholders must be equal in all respects. Whether in a company so constituted preference shares can be issued is a question the final decision of which has not yet been given, although, perhaps, in the present state of the authorities, it may be concluded in the Courts of first instance by *Hutton* v. *Scarborough Cliff Hotel Company* (3). However this may be, if preference shares were to be issued, a resolution of the company would be necessary to sanction the issue, and every shareholder would have an opportunity of voting on the question. In the present case the shares to be transferred under the agreement were to be shares in a company to be formed by the Defendant, the capital of which was not to exceed £12,000. In the absence of any stipulation to the contrary that means, in my judgment, a company having its capital divided into shares, all of which were to stand on an equal footing. If a company with preference or priority as regards part of its capital had been contemplated, I can hardly doubt that the agreement would have contained a stipulation as to the proportion of the preference capital and the ordinary capital, and

(1) 22 Ch. D. 377. (2) *In re South Durham Brewery Company*, 31 Ch. D. 261.
(3) 2 Dr. & Sm. 521.

as to whether the shares that were to be taken in payment were to be of one class or the other, or, if both, in what proportions. It seems to me that it could not have been intended to leave it to the Defendant to say whether all the shares except 100 should be issued as preference shares, carrying interest at any rate which he might think fit to determine. In my judgment, therefore, the company which was formed by the Defendant was not one in which the Plaintiffs could be compelled to accept shares, and, that being so, I think that the Defendant is bound to perform the other alternative of the covenant. As to that I may refer to the case of *Studholme* v. *Mandell* (1). There an action of covenant was brought by the plaintiffs upon covenants in an indenture by which the plaintiffs demised a mill to the defendant, and in which the defendant covenanted to leave the mill-stones in as good condition as he found them, or to pay to the plaintiffs so much as they should be damnified; the damage to be estimated by *A.* and *B.*, who viewed them when the defendant entered upon the premises. The plaintiffs assigned for breach, that the defendant had left the mill-stones damnified, and had not made satisfaction. The defendant pleaded that *A.* and *B.* had not estimated the damage. The plaintiffs demurred. It was argued for the defendant, that this was a condition disjunctive, and therefore the leaving of the mill-stones damnified would not be a breach, because at the time of the covenant he had elected to perform the one or the other part; therefore (according to *Laughter's Case* (2)), without estimation by *A.* and *B.* of the damage of the mill-stones, the defendant was excused from the performance, because it was impossible for him to make the adjudication, or to compel *A.* and *B.* to do it; and till that be done, the defendant could not be liable, no more than if *A.* entering into bond to perform the award of *B.* and *C.*, and *B.* and *C.* would not make any award. Against that it was said in effect, "These covenants are part of the condition of the bond. And since the latter part of this disjunctive covenant is for the safety of the defendant, it belongs to him to procure this estimation, or otherwise he shall be liable. If the estimation

(1) 1 Ld. Raym. 279.
(2) 5 Rep. 21 b.; Cro. Eliz. 398; Sir F. Moore, 357.

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ought to be made by such persons as the obligee should appoint, and the obligee had refused to appoint, this would have excused the defendant; because the performance of the covenant is rendered impossible by the act of the obligee. But in this case the fact is contrary." And of that opinion was the whole Court, and *Treby*, C.J., put this case (1), *A.* in consideration of £100 bound himself in a bond, with condition either to make a lease for the life of the obligee before such a day, or to pay him £100. The obligee died before the day, yet it was adjudged that the obligor should pay the £100, and not the damages which had been suffered if he had got a lease for his life, and accordingly there was judgment for the plaintiff.

It seems to me that that is an authority that in such a case as the present, the default in the performance of the one alternative being due to the act of the Defendant, who might have formed his company in another way, he is bound to perform the other alternative. Consequently, there must be judgment for the Plaintiffs for £1000 with costs.

G. A. S.

C. A.

From this judgment the Defendant appealed. The appeal was heard on the 13th of November, 1894.

Hastings, Q.C., and *Bramwell Davis*, for the Appellant:—

The ground upon which the learned Judge decided the case was that the Plaintiffs were not bound to accept shares in a company in which all the shares were not on an equality. But there is no contract in the deed of covenant, either express or implied, that there should be any such equality in the shares in the intended company. The case on which he relied—*British and American Trustee and Finance Corporation* v. *Couper* (2)—has no application to the present case.

But it is also said that the Plaintiffs were entitled to shares to the value of £1000. That is not the true construction of the deed. The recital shews that what was meant was shares of the nominal amount of £1000. If the construction contended for were correct, there would be no meaning in the alternative cove-

(1) S.C. Salk. 170, pl. 2.

(2) [1894] A. C. 399.

nant, for the payment of £1000 and the transfer of shares worth £1000 in the market are practically the same thing.

Grosvenor Woods, Q.C., and *Griffith Jones*, for the Plaintiffs, were not called on.

LORD HALSBURY:—

I confess that in this case I have not been able to entertain any doubt from the first time when the covenant was read to me. I should construe it as I should construe the language of any ordinary document. I think if the covenant itself is not ambiguous I have no right to refer either to the recitals or to the statement of the consideration; and it seems to me, without at all going into the reasons of the learned Judge below for his judgment, that it would not be proper to hold that those words are not to be taken in their ordinary natural meaning—that the Plaintiffs were to have £1000 worth of shares. It is vain to contend that if you take any other construction of the language you do not have to strike out the word "worth" altogether. Therefore, upon the ordinary principle of construction, if there is nothing cutting down the natural meaning of the word I must construe it to be the natural meaning of the word. You cannot construe an instrument of this sort by striking out a word, and asking us to read the document in such a way as to make that word inoperative. I am of opinion that the Court below was right—that the true construction of the language is that there were to be £1000 worth of shares; and it is admitted that these shares were not worth £1000. The appeal must be dismissed with costs.

LINDLEY, L.J.:—

I am of the same opinion. The covenant is by *Taylor* that he will within twelve calendar months of the date of the document pay £1000, or hand over to, or otherwise transfer into the names of, the Plaintiffs £1000 worth of fully paid-up shares in a company to be formed by *Taylor*, the capital of which is not to exceed £12,000. Now, what does that mean? Mr. *Graham Hastings* has invited us to construe it that he will pay £1000 in

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cash or in shares, meaning that he will transfer shares to the nominal value of £1000. I do not think that that is the fair meaning of the language used. I put to Mr. *Graham Hastings* another aspect of the case: supposing these shares had gone up, and *Taylor* had offered and tendered a smaller number than £1000 in nominal value, but £1000 worth in the market, what would have been the answer? The shares would be taken at their value according to the market. It is the same question from another point of view; but it strikes me that the answer to it is clear. No one in the case supposed could have accused *Taylor* of breaking his contract; he would have done exactly what he said he would do—paid £1000 worth of shares. Reliance has been placed on the recitals, and the recitals, no doubt, express the intention of the parties in language somewhat different; but I do not think it is right to construe the plain words of this covenant with reference to the language of the recitals, more especially as the draftsman has departed from the view which he entertained when he drew the recital. There is no covenant here to form a particular company with a defined capital. The covenant is to pay the money or £1000 worth of shares in a company to be formed; and although, of course, the recitals from one point of view help Mr. *Graham Hastings*, the covenant that he is to pay £1000 worth is against him. I think the only safe way is to adhere to the language of the covenant, which, to my mind, is perfectly plain.

RIGBY, L.J.:—

I am of the same opinion. The word "worth" is not only an important word, but it appears to me to be the important word in that covenant. What does "worth" mean? It means worth in the sense of the real value to be ascertained in some manner. There can be no difficulty in ascertaining it; it does not mean nominal value. A thing may be of the nominal value of £100,000, or, as in this case, £1000, and yet not be worth a farthing. I do not consider that the covenant is in any way ambiguous. If it had been, I do not see that we should have got any light from the recitals, or from the consideration, because I consider they are very ambiguous, and that they do not exclude the meaning

which is given in the covenant. The better way, however, to put it, undoubtedly is that unless we see that there is something ambiguous in the covenant itself, we ought not to care about the consideration.

Solicitors: *R. Jenkins*, agent for *Smith, Owen, & Davies, Aberystwith; Daniel Jones*, agent for *A. J. Hughes, Aberystwith.*

M. W.

CHITTY, J.
1894
Nov. 1.

In re GRAHAM.
GRAHAM *v.* NOAKES.

[1884 G. 3.]

Receiver—Receiver's Recognizance—Rents and Profits of Real Estate—Insurance Money—Repairs—Sureties—Extent of Liability.

In ascertaining the liability of sureties under a receiver's recognizance, the Court proceeds on the principle that the surety is liable (to the extent of the amount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or account for: consequently, where a receiver of "rents and profits" of real estate had (1.) insured some of the farm buildings in his own name, and received and misapplied the insurance money, had (2.) received, and not accounted for, dividends on Consols in Court representing proceeds of sale of real estate, had (3.) received, under an order of the Court, money representing personal estate, to be spent in repairs, which he had misappropriated:—

Held, that the sureties had been properly charged in respect of these three items.

Practice and duties of receivers of rents and profits as to insurance and repairs discussed.

ADJOURNED SUMMONS.

The question raised by this application was, the extent of the liability of the sureties of a defaulting receiver of rents and profits of real estate, under the terms of the usual receiver's recognizance. The facts material for the purposes of this report were as follows:—

In April, 1884, a receiver was appointed in this action of the "rents and profits of the real estate" of the testator *James Graham*. Security with two sureties was given in the usual way on this appointment. By the recognizance, which was in the form given in Appendix L to Rules of Supreme Court, 1883, Form 21, the receiver, and two sureties, were jointly and severally bound in the sum of £3500, the condition of the bond being, that if the receiver "shall duly account for all and every the sum or sums of money which he shall so receive on account of the rents and profits of the real estate of the said testator, at such periods as the said Court or Judge shall appoint, and do

and shall duly pay the balances which shall from time to time be certified to be due from him," the recognizance shall be void.

In the early part of the year 1891 the receiver got into difficulties and absconded, and by an order of the 15th of February, 1894, he was discharged, and ordered to leave his final account at Chambers, and pay into Court the balance certified to be due from him. This order not having been complied with, and the sureties having submitted to the jurisdiction of the Court in this action, as fully as if an action to enforce their bond and recognizance as sureties for the receiver had been brought, the receiver's accounts were taken in their presence, when the question was raised whether, under the terms of this recognizance, the sureties were liable for anything more than "rents and profits," and particularly, whether they could be charged in respect of the following items:—

(1.) A sum of £350 for fire insurance money, as to which it appeared that the receiver had in 1885 insured some farm buildings in his own name, describing himself in the policy as "receiver of the rents and profits" of the testator's estate; that he had charged and been allowed the premiums in his accounts; a fire having occurred in 1893, that he had received and misapplied the insurance money.

(2.) Various sums amounting to about £100, paid to the receiver under divers orders of the Court, out of dividends on Consols in Court representing the proceeds of sale of part of the real estate sold by order of the Court pending the action, and after the date of the order appointing him receiver, such proceeds of sale standing to a separate account to be re-invested, under the trusts of the will, in real estate.

(3.) A sum of £21, balance of a sum of £220, paid to the receiver, under an order of the Court, out of moneys representing personal estate, to be applied in repairs on the real estate, £199 only having been spent in repairs.

Byrne, Q.C., and *T. L. Wilkinson*, for the sureties:—

Item 1 is capital: it represents real estate, and is in no sense "rents and profits," and, therefore, not within the terms of the recognizance. There was no order directing the receiver to

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insure, and no existing policy to be kept up; but the receiver started a fresh insurance in his own name—a most unusual course of proceeding. If this surcharge is allowed, a receiver might insure a mansion-house, or the pictures, for a very large sum, and then if he received and misapplied the insurance money the sureties of "rents and profits" only would be liable. *Maunsell* v. *Egan* (1), one of the cases that will be relied on by the Plaintiffs, does not govern the present case: there the form of the recognizance was different, and it was mainly a question of the costs incurred through the receiver not doing his duty. *Dawson* v. *Raynes* (2) is also distinguishable; so, too, is *In re Lockey* (3). This sum of £350 is quite outside the scope of the order appointing this receiver and the recognizance, and the sureties are not liable to make it good. Item No. 2 represents dividends paid out under various orders of the Court, and does not represent rents and profits; and item No. 3 is money paid out of personal estate for repairs, and not rents and profits for which we are liable.

[CHITTY, J.:—It is stated in *Kerr* on Receivers (4) that the surety is answerable to the extent of the amount of his recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for.]

That proposition is far too wide: probably it was intended by this recognizance to make the sureties liable for everything; but as a matter of construction we submit that it fails to go as far as that.

Levett, Q.C., and *Bramwell Davis*, for the Plaintiffs:—

The sureties are liable for the balances unaccounted for to the extent of the penalty, and cannot be relieved from their liability, except upon paying everything that the Plaintiffs would have got, if this receiver had duly accounted for the rents and profits, and duly paid into Court the balances certified to be due from him. They must pay all that their principal can be required to pay: *Dawson* v. *Raynes*; *Maunsell* v. *Egan*.

(1) 3 J. & Lat. 251.
(2) 2 Russ. 466.
(3) 1 Ph. 509.
(4) 3rd Ed. p. 217.

It was quite proper that these buildings should be insured; the premiums were all allowed in passing the accounts from 1885 to 1892; the policy moneys were paid to him in his capacity of receiver; the dividends making up item 2 were clearly profits of real estate. Then as to item 3: this money was paid to him, in his capacity as receiver, for repairs; it is the duty of a receiver to do repairs. The meaning of this recognizance is, that the estate is to be guaranteed against the misconduct of the receiver, and the liability of these sureties, up to £3500, is co-extensive with that of the receiver. The surcharges made in respect of these three items are therefore proper, and ought to be allowed.

Byrne, in reply:—

The Plaintiffs' argument amounts to this, that whatever the form of the recognizance, and even though the order only appoints the receiver to collect "rents and profits," still the sureties are liable for everything the receiver does or receives. No authority has been cited for so sweeping a proposition. It is one thing to be a surety for rents and profits, and quite another thing to be a surety for *corpus* of the estate. This is an attempt to make sureties only of "rents" liable for capital received and misapplied by the receiver.

CHITTY, J. (after stating the form of the recognizance, continued):—

The argument for the sureties raises the question of the principle upon which this account is to be taken, as against the sureties. Now, it is clear that at Common Law, there having been default on the part of the receiver, the whole sum of £3500, mentioned in the recognizance, is recoverable as against the sureties; and if authority be required on that point it is furnished by the certificate that was given by the Judges in *Dawson* v. *Raynes* (1), who were of opinion that if there had been any breach of the condition of the recognizance, the penalty was a debt at law; and the question of interest did not arise at law.

(1) 2 Russ. 468.

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The practice is, as stated by *Kerr* on Receivers (1), and as is well known, when the recognizance is put in force at law, to apply to the Court by whom the receiver has been appointed to submit to the jurisdiction, and offer to have the account taken by the Court who appointed the receiver. On taking the account, the Court does not necessarily exact the full amount of the sum mentioned in the recognizance; but the Court, when it looks into the case, and considers the nature of the office of the receiver in the circumstances, applies not a principle of contract, but a principle of equity, to the account, and relieves the sureties against demands which the Court, on a full consideration of the matter, thinks the sureties ought to have allowed in their favour. Mr. *Kerr* in his book states that "the surety is answerable to the extent of the amount of the recognizance for whatever sum of money, whether principal, interest, or costs, the receiver has become liable for, including the costs of his removal, and of the appointment of a new receiver in his place"; and, in my opinion, that is a correct general statement of the principle on which the Court proceeds.

In *Dawson* v. *Raynes* (2) the Lord Chancellor pointed out that the penalty was forfeited by breach of the condition; the amount of the penalty is the debt due from the sureties; but he did consider the question whether they should be charged, in taking the account, with interest; and in the circumstances of that case, that is to say, upon equitable considerations, he relieved them from the penalty of the recognizance to the extent of the demand made against them for interest. He says (3): "It seems to me that it would be difficult to say, that, where the principal debtor"—that is the receiver—"would be obliged to pay interest, there would not be an equity that the surety should pay the interest in default of the principal."

Now, having stated what I take to be the principle on which the Court proceeds, I am in a position to deal with the particular items. The first item is the sum of £350. With regard to this insurance it appears that, in the former accounts passed by the receiver, he had been allowed by the Court, and properly

(1) 3rd Ed. p. 217. (2) 2 Russ. 466.
(3) 3 Russ. 471.

allowed, the premiums which he had paid. The policy itself is referred to in the former accounts, and the Court therefore sanctioned this insurance, and, I think, I am justified in saying, sanctioned the insurance in the receiver's own name. I have inquired into the matter. It is, say my Chief Clerks, the practice for receivers to insure; but I am not satisfied one way or the other whether they insure in their own names. Of course, they might insure the property in the names of the trustees or in other names, though this receiver was allowed to insure in the manner I have mentioned. In many cases when receivers are appointed there is an insurance already on foot, and then he takes over the policy, pays the premiums, and is allowed them on passing his accounts. It appears to me that it is consistent with his duty as receiver, and that the Court has itself sanctioned it, that he should make and keep this insurance on foot; and I think that he received the insurance money as receiver. The policy, on the face of it, was granted to him on that footing.

It appears to me that what the receiver did with regard to this insurance, was done by him in his character of receiver; that he himself, in accounting to the Court, would have been held liable to account for these moneys; and when I am considering the equities fairly applicable to a case of this kind, it seems to me that if I charge him, as I must have charged him, as between himself and the Court, with the amount of this insurance money thus received, so I ought to charge the sureties. I think there is no equity on their part sufficient to justify me in saying that they ought to be relieved against this charge for £350. Some cases, of course, may be put where possibly orders might be made which would be altogether outside the scope of the receivership. That is not the case which I am dealing with here on this first item, and any case of that kind may be left to be considered when it arises. In my opinion, the sureties are chargeable with the sum that the receiver received on this policy, and did not apply in accordance with his duty.

The next item is as to the sum of £100. Under orders of the Court the receiver received these dividends as part of the income of the real estate. In my opinion, this again was within the scope of his duty as receiver, and I ought not to relieve the

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sureties, who are liable (as I have said) at law to the full extent of £3500, in respect of this income, which was income of real estate, seeing that the money in Court was liable to be laid out in the purchase of other land. It was strictly income—that is to say, profits of real estate.

Then the next item is the sum of £21, balance of moneys which ought to have been spent in repairs on the real estate. Now, repairs of real estate fall within the scope of the receiver's duty: he is allowed to do certain repairs without even coming to the Court. In fact, he may at his own risk execute repairs of a more extensive kind. There is no exact rule that I know of as to the amount that he may do upon his own responsibility; but, of course, what he does upon his own responsibility is liable to be questioned, unless he has obtained the previous sanction. Proper repairs of real estate appear to me again to be a matter which falls within the functions of a receiver, where the receiver is appointed to receive the rents and profits. That being so, it appears to me again that I ought not to relieve the sureties from this sum of £21, with which the Chief Clerk has proposed to charge the sureties.

The result, therefore, is that the surcharges made in respect of these three items are proper and must be allowed; and as the sureties have failed in their contention, the costs of this application must be costs of the surcharge.

Solicitors: *Indermaur & Brown*, agents for *C. Hamilton White, Maidstone*; *A. H. Arnould & Son.*

W. C. D.

In re NEGUS.

CHITTY, J.

1894

Nov. 1, 3, 6.

Solicitor and Client—Costs—Taxation—Agreement for Tenancy for less than Three Years "Leases or Agreements for Leases, at Rack-rents"—Scale Fee—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c 44), ss. 2, 4—*General Order under Solicitors' Remuneration Act,* 1881, s. 2, *Schd. I., Part II.—Lessor and Lessee—Cost of Counterpart.*

In the absence of any prior written agreement, the Taxing Master is bound to tax according to scale in all cases where the scale is applicable, notwithstanding the fact that an item bill has been delivered at the request of the client. The fact that a solicitor has delivered an item bill in the first instance does not preclude him, when before the Taxing Master, from consenting to its being taxed according to scale. *In re Heather* (1) held not to apply to such a case.

The costs of the lessor's solicitor "for preparing, settling, and completing" an agreement for a tenancy for less than three years at a rack-rent are to be taxed according to the scale prescribed for "Leases or Agreements for Leases at a Rack-rent" in Schedule I., Part II., to the General Order under the *Solicitors' Remuneration Act,* 1881.

In estimating the costs properly payable by the lessee to the lessor's solicitor, the cost of the counterpart or duplicate agreement must be deducted from the scale fee when ascertained.

SUMMONS to review a taxation of costs.

The question raised by this application was whether a tenancy agreement for a term not exceeding three years at a rack-rent was a "lease" or "agreement for lease," to which the scale, prescribed by Schedule I. Part II., of the General Order under *Solicitors' Remuneration Act,* 1881, applied, or whether it ought to be taxed under the old system, as altered by Schedule II.

In April, 1894, a tenancy agreement was prepared by one *W. Negus,* the landlord's solicitor, by which "the landlord agreed to let," and "the tenant agreed to take," for the purposes of his business, a flat in *Bond Street,* from the 25th of March, 1894, for the term of three years, at the yearly rent, for the first fifteen months of the said term, of £290 per annum, and for the last twenty-one months of the said term, of £275 per annum, payable quarterly, upon certain terms and conditions as to user, &c., specified in the agreement. The agreement had been engrossed

(1) Law Rep. 5 Ch. 694.

CHITTY, J. 1895. *In re* NEGUS.

in duplicate, and signed by both parties, but had not been handed to the tenant, though he had been let into possession of the premises on the 19th of the same month of April.

At the request of the tenant, Mr. *Negus* delivered to him an item bill under the old system as altered by Schedule II. of his costs for preparing the agreement, which, with £1 15*s.* 7*d.* for disbursements, amounted to £14 11*s.* 7*d.* An order of course for taxation of this bill was obtained by the tenant, under the third party clauses of the *Solicitors Act.* On this bill of costs coming before the Taxing Master, he considered that the scale prescribed by Schedule I., Part II., of the General Order under the *Solicitors' Remuneration Act,* 1881, applied, and taxed the bill on that footing at £14 0*s* 7*d.* Mr. *Negus* was willing to accept this taxation as correct; but the tenant objected that the fee prescribed by Schedule I., Part II., was not applicable, as this was a mere tenancy agreement under hand only for a term not exceeding three years, and that such an agreement was neither a "lease" nor an "agreement for lease" within the meaning of Schedule I., Part II.; and further, that the bill, as delivered, contained many items which the tenant had not undertaken to pay, and for which he was not liable under any law or custom, and therefore that the bill ought to be taxed as an item bill, and only such charges allowed as were reasonable and properly incurred in the preparation of the agreement. The Taxing Master overruled these objections, considering that the case was covered by the decision of *In re Emanuel and Simmonds* (1), in which Lord Justice *Cotton* had explained "agreement for lease" as meaning agreements on which the parties intended to rely as sufficient for the purpose of stating the terms of the tenancy without having a formal lease executed.

The tenant thereupon took out the present summons to review this taxation.

Whitehorne, Q.C., and *E. Ford,* for the summons:—

The scale fee is not applicable on three grounds.

First. Both parties, when they went before the Taxing Master, intended to have this bill of costs taxed as an item

(1) 33 Ch. D. 40.

bill under the old system; and under these circumstances the Taxing Master had no right, *mero motu*, to apply the scale prescribed by Schedule I., Part II.; and further, the solicitor having delivered an item bill, could not in effect withdraw it—*In re Heather* (1)—by consenting to have the scale applied, when he saw that it was to his advantage to be taxed according to scale.

Secondly. This tenancy agreement is neither "a lease" nor an "agreement for lease": the decisions of *In re Emanuel and Simmonds* (2) and *Savery* v. *Enfield Local Board* (3) do not touch this question; in both those cases the tenancies were for terms exceeding three years, and there was an actual lease, the only question being whether the scale fee covered the costs of the prior agreements. "Leases" or "agreements for leases" in Schedule I., Part II., must mean leases or agreements for leases by law required to be by deed or in writing: simple tenancy agreements were not intended to be included. "Rent" must mean "annual rent," and consequently would not meet the case of a tenancy for less than a year. If the Taxing Master's construction is correct, innumerable hard cases would arise—there might be an agreement to let a workman's room at 7*s.* a week, or an agreement to take a cottage, where the solicitor's remuneration under the scale might exceed the whole amount of rent. That could never have been intended.

Thirdly. The tenant is not bound to bear the expense of the counterpart or duplicate: *Jennings* v. *Major* (4); and the scale fee to the lessor's solicitor includes costs of counterpart. This is a third party taxation, and therefore the scale cannot apply, because we are not bound to pay for the counterpart.

On these grounds we contend that the taxation was wrong.

Manson, for Mr. *Negus*:—

The solicitor is not estopped by delivering an item bill from accepting the taxation by scale; both parties thought the scale did not apply—they both made a mistake, this agreement is a document on which the parties intended to rely as sufficiently

(1) Law Rep. 5 Ch. 694.
(2) 33 Ch. D. 40.
(3) [1893] A. C. 218.
(4) 8 Car. & P. 61.

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setting forth the terms of the tenancy, and is within the definition given by Lord Justice *Cotton* in *In re Emanuel and Simmonds* (1), and the Taxing Master was quite right in taxing it on the footing that the scale applied.

As to the costs of the counterpart or duplicate and the stamp, I am quite willing that the costs of that may be deducted from the amount allowed by the Taxing Master. The amount can be readily ascertained and agreed now to avoid a reference back to the Taxing Master.

Whitehorne, in reply.

CHITTY, J.:—

Both parties when before the Taxing Master in the first instance seem to have adopted the principle that this was an item bill, which had to be taxed on that footing. The Taxing Master himself considered that the scale applied; and assuming that he was right, still it is contended on behalf of the tenant that, in these circumstances, the Taxing Master could not of his own motion apply the scale. The argument did not proceed upon any doctrine of estoppel or question of conduct or misconduct, but on the circumstances I have mentioned, and probably the best form which the argument assumed was that which had relation to the case of *In re Heather* (2), where it was held that a solicitor could not withdraw a bill which he had once delivered without the consent of the client, and I may add, without an order of the Court. Consequently it was said, that Mr. *Negus* was bound by the bill which he had delivered, and must therefore submit, as a matter of law, to have his bill taxed as an item bill. It appears to me that the principle of *In re Heather*, which was decided before there was any distinction between scale and non-scale taxed costs, does not apply to this case.

It is the practice, I believe, for the Taxing Masters, where the solicitor brings in an item bill in a case to which the scale applies, to tax the bill by the scale; and I think that practice, which I understand from inquiry prevails, is perfectly right, on

(1) 33 Ch. D. 47. (2) Law Rep 5 Ch. 694.

the ground that the Taxing Master is bound to tax according to law: he is bound to apply the general order relating to the taxing of bills in all cases where it is applicable. Now, though the solicitor here submitted a bill with items in the first instance, there having been no agreement in writing as between him and the tenant, or between him and the landlord, that the charges should be made on the non-scale principle, it was competent for him to acknowledge his error and to submit, when the parties were before the Taxing Master, to have his bill taxed according to scale: and that is the substance of what happened here, because, when Mr. *Negus* found that the Taxing Master was convinced that the scale applied, he at once assented, and the bill has been taxed upon that basis. It appears to me, therefore, that this first objection cannot be sustained.

Then I come to the second point argued, which raises a question of substance. It appears to me that this agreement is a "lease" or "agreement for a lease," within the meaning of Schedule I., Part II. (first scale). The Court of Appeal in *In re Emanuel and Simmonds* (1) have put a construction upon the meaning of the term "agreements for leases." The only point that the Court had to decide, and did decide in that case, that is relevant to the case before me, was, that the solicitor could not make a double charge, and that the meaning of the term "agreements for leases" in Schedule I., Part II., was not the strict meaning which would be applied to these terms, according to the technical view of the law, but that "agreements for leases" included (2) "Agreements on which the parties intended to rely as sufficient for the purpose of stating the terms on which the property was held without having formal leases executed." The Court of Appeal did not decide that the term "agreements for leases" did not include what the words primarily import, viz., an agreement for the granting of a lease, as distinct from an agreement which operates itself as a lease, but they put the construction that I have mentioned upon the words "agreements for leases"—a construction which, if I may take the liberty of saying so, is proper and reasonable. It would be an error to say that Lord Justice *Cotton* defined an agreement for a lease as being only

(1) 33 Ch. D. 40. (2) 33 Ch. D. 47.

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that which I have just quoted from his judgment. There is no strict definition, but there is an explanation of the term, shewing, as is mentioned particularly by Lord Justice *Bowen*, that the expression is intended to include documents of the kind already described.

Now, the argument for the tenant is, that the term "leases" or "agreements for leases" applies to such leases or agreements only as the law requires to be in writing, though it is admitted that there are no words, either at the commencement or any part of Schedule I. sufficient to justify the Court in accepting that interpretation. The argument is founded to some extent by suggesting cases of extreme hardship which might arise if it were held that the scale applied to any other kind of leases, or agreements for leases, and, consequently, that the scale ought, on the reasonable construction of such a rule as this, to be so construed as to exclude these causes of hardship.

It is quite unnecessary for me to enter into a dissertation on the term "lease," though I will state shortly that the term "lease" is used in strict law so as to include any demise, for any period however short or however long, and it is sufficient for this purpose to refer to the *Statute of Frauds* (29 Car. 2, c. 3), the first section of which, as is well known, enacts that all leases by parol, and not put in writing and signed by the parties making or creating the same or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only. The term "lease" is well known to the old lawyers and, I hope, to the modern ones. Then comes the 2nd section, which contains a well-known exception, though it still speaks of the excepted things as "leases": "Except all leases not exceeding the term of three years from the making thereof." I need not read the rest. So that the *Statute of Frauds* shews upon the very face of it that that which is a demise for a term not exceeding three years still is properly called at law a "lease," and that a lease may be made without any document whatever, but simply by word of mouth. Later in the same Act, the distinction between a lease, and an agreement for a lease, is maintained, because where the instrument is an agreement for a lease in the strict sense of the term, there the

4th section applies, that being a "contract of"—that means concerning—land.

Then comes the well-known statute of 8 & 9 Vict c. 106, s. 3, which enacts, that a lease required by law to be in writing shall be void in law unless made by deed. Now, putting these enactments together, the result of the contention for the tenant is, that the scale does not apply except to leases which the law requires to be made by deed, and I am constrained to state that I cannot find that the words leases in writing or leases by deed are mentioned on the face of Schedule I. itself. I need hardly state that the schedule only applies when there is a document. The schedule is headed with "Lessor's solicitor for preparing, settling, and completing lease and counterpart," and consequently explains that there must be a document; but that is a long way off saying that the document must be a deed, and that it does not mean a deed seems to follow plainly from the term "agreements for leases" found in this schedule and interpreted as the words have been interpreted by the Court of Appeal in *In re Emanuel and Simmonds* (1). I am therefore unable to accept the construction contended for by the tenant as the right construction to be put upon the schedule. I agree that in ordinary parlance, and in conventional language, it may fairly be said that a distinction is constantly made between a "tenancy" and a "lease," and I daresay many solicitors speaking to their clients talk of a "lease" in the sense of meaning a lease which the law requires to be by deed; but I am unable to say that I can introduce this same loose parlance into the rule, and adopt it as having been the meaning of the great authorities by whom these rules were made under the *Solicitors' Remuneration Act* of 1881.

As to the cases of hardship, I am afraid that I must lay them aside, for they are to a large extent merely supposed cases, which do not often occur in the ordinary course of business; besides, I do not think that these rules were specially addressed one way or the other to cases of that kind, but if a person has to take a lease for a period less than three years and consults a solicitor, he may have a considerable amount of trouble (particularly in the case of a flat, as I know by my own experience here) in

(1) 33 Ch. D. 40.

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advising his client as to what he shall accept or decline. It does not appear to me reasonable to say that this 5*l.*, which is the minimum charge, must be regarded as so excessive as to justify the Court in putting an interpretation on the reading of the rule which would amount to a decision that the scale fee did not apply to the case of a letting, which the law does not require to be in writing.

The document in the present case relates to the letting of a flat. The documents have not been exchanged; but taxation proceeds upon the footing that they will be exchanged, so nothing turns upon that. The term does not exceed three years from the making thereof, if I look upon these non-exchanged instruments as documents pertaining to the demise. The words are, "the landlord agrees to let and the tenant to take"—words which have been interpreted—I need not refer now to the authorities—to operate as a present demise, and if the documents had been exchanged I think that the demise would have been made. There was to be immediate possession, and the documents were to be exchanged—the only reason for the non-exchange of them was this question of the amount to be paid by the tenant for the cost of their preparation.

The document which would enable the tenant to take possession would be a "lease" in point of law; but if by reason of its not having been exchanged it is to be considered only as an agreement for lease, then, on the face of the document itself, it is within the explanation of the term, as given by the Court of Appeal; for the parties here evidently intended to rely upon that document, and did not intend to have any formal lease by deed or otherwise executed.

One other point remains, viz., that this is a third party taxation, and the general rule is that a third party stands, as between himself and the solicitor whose bill he is taxing, in the position of the party chargeable. But that rule does not prevent the Taxing Master from considering the question of the liability of the third party. This has been decided, and, by way of illustration, I may refer to *In re Brown* (1). The trustee in that case was liable, as between himself and the solicitor who was defend-

(1) Law Rep. 4 Eq. 404.

ing his bill as against the *cestuis que trust*, for the items impeached; but Lord *Romilly* held that those items were properly disallowed by the Taxing Master because they could not have been charged as against the trust estate. The solicitor had pointed out to the trustee, as was his duty, that he would not be allowed to charge; but still the trustee insisted upon the work being done, and yet these items were struck out from the bill when it was taxed by a third party. Now it is part of the general law (though it is unnecessary to go into the authorities) that in the case of lessor and lessee, the lessee is not bound to pay for the counterpart, and the scale fee prescribed by Schedule I, Part II, includes the counterpart; the words in Schedule I. are, "Lessor's solicitor for preparing, settling, and completing lease and the counterpart," and the decisions upon these rules generally shew, that the business contemplated by the rules must be wholly performed by the solicitor in the transaction, in order to make the scale remuneration apply.

There was a counterpart in this case, and it is plain that the landlord was liable to his solicitor to pay for this counterpart; the Taxing Master in applying the scale, as he did, according to the amount of the rent, has necessarily included the charge for the counterpart, in respect of which there is no liability on the part of the tenant to the landlord; consequently, it was argued for the tenant, that the scale could not apply on this third party taxation. In my opinion that argument cannot be sustained, for these rules having—as has been well explained by Lord *Halsbury* in the case of *Savery* v. *Enfield Local Board* (1)—been made for the purpose of preventing disputes on taxation and providing some guidance as to the mode in which charges should be made, prescribed and fixed a gross sum for each document prepared, which could be known beforehand to any person able to employ a solicitor; and I cannot conceive it to have been the intention of the framers of the rules that whilst the landlord had to pay, say a minimum £5 to his solicitor, still the solicitor might be entitled to charge £10 or £20 on the non-scale system as against the lessee. My opinion is that this contention cannot prevail, and I think the Taxing Master was right in taxing this

(1) [1893] A. C. 225.

CHITTY, J. 1894 In re NEGUS.

bill in the manner he has done, as being the bill that the landlord has to pay. There is a novelty in the point about the counterpart, and I think that the only solution of this supposed difficulty that is reasonable and right is this—that the Taxing Master should tax, as he has done this bill, as he would have taxed it as between the solicitor and landlord, viz., on the scale footing, and then seeing that the tenant was only liable for the preparing, settling, and completing the lease, he should have made a reasonable deduction from the scale in respect of the counterpart. The parties here have been very reasonable, and they do not require me to send the bill back to the Taxing Master upon this small point: they have agreed that 5s. for the stamp duty on the counterpart, and 18s. in respect of the proper costs in relation to the counterpart, as distinct from the lease itself, should be deducted from the amount which the third party taxing has on the present taxation to pay. The result is, the application has substantially failed, and must be dismissed, and the tenant must therefore pay the costs.

Solicitors: *Daubeny & Mead; W. Negus.*

W. C. D.

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[1888 P. 3082.]

Administration—Land situate in Foreign Country—Trusts invalid under Foreign Law—Valid Trust for Sale—Application of Proceeds of Sale—Election.

An English testator, who owned some land in *Sardinia*, by his will gave all his real and personal estate to trustees upon trust for sale and conversion, and to hold the same until conversion and the proceeds of sale after conversion, upon certain trusts (*inter alia*) for his children for their respective lives, with remainders to their respective issue. These trusts were (as the Court held on the evidence) to a great extent invalid under Italian law as regarded land in *Italy*, the result being that the tenants for life took their shares absolutely. Part of the land in *Sardinia* had been sold by the trustees:—

Held, that, whether the trustees or the children took the land as "heirs" according to the Italian law, the trustees had power under that law, and that it was their duty to sell the land, and that the proceeds of sale must be held by them upon the trusts declared by the will:

Held, also, that the rents of the unsold land until sale would devolve according to Italian law, but that it was competent to and legal for the children to elect that those rents should be applied as if they had been income resulting from the proceeds of sale.

SUMMONS to proceed with an inquiry directed by an order for the administration of the estate of *Benjamin Piercy*, who died in 1888.

Benjamin Piercy, by his will dated the 5th of December, 1883, devised and bequeathed all his real and personal estate whatsoever and wheresoever to which he should be beneficially entitled at the time of his decease unto *F. G. Whitwham*, *E. B. Bernard*, and *Evan Morris*, whom he thereby appointed trustees and executors of his will, upon trust to sell and convert into money his said real and personal estates, or such parts thereof as should be of a saleable and convertible nature, and to get in the other parts thereof. And he directed his trustees to hold the moneys to arise from such sale, conversion, and getting in upon trust thereout in the first place to pay the expenses incidental to the exercise of the preceding trust and his funeral and testamentary expenses, and to apply one-tenth of his estate over and above

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£110,000 to such charitable institutions and objects as his trustees might determine, and to stand possessed of his residuary real and personal estate until conversion and the surplus of the said moneys, and all his estate after conversion thereof (which was therein referred to as his residuary estate) upon trust to pay the income thereof as follows, viz., one-fifth to his wife *Sarah Piercy* during her life, if she should so long continue his widow, and the remainder equally among all his children and his brother *Robert Piercy* and his sister *Jane Piercy*. And after the decease of his said wife or her second marriage, whichever should first happen, in trust for all the testator's children and his brother *Robert* and his sister *Jane* in equal shares, on the trusts following as to the shares of his children and his brother *Robert*, viz., to stand possessed of one moiety of the share or shares to which any child might be entitled in trust to pay the rents, interest, income, or annual produce of such moiety, without power of anticipation or alienation, to such child for and during his or her life, and after his or her death for all and every his or her child or children who should attain twenty-one, or to such of them as he or she might by deed or will appoint; and if any child should die without issue the moiety to which he or she was entitled should be divided equally amongst the testator's other children, and the children of a deceased child should be entitled to the share to which such deceased child would have been entitled, if living. And the testator directed that his trustees should stand possessed of the share to which his brother *Robert* was entitled upon trust to pay the income thereof to him during his life, without power of anticipation or alienation, and after his decease for all and every of his children or such one or more of them as he should by deed or will appoint. And the testator declared that the share or shares to which any child should be entitled should absolutely vest in such child on the testator's death. And the testator declared that the share or shares belonging to his children being daughters should be for their sole and separate use, and should be settled upon them on marriage: and that his trustees might, at their own discretion, raise any part or parts of the expectant share of any child, not exceeding one-half, for his or her advancement, preferment, or benefit, as his trustees should think fit. And the testator also

declared that his trustees might postpone the sale and conversion of his real and personal estate, or any part thereof, for so long as they should think fit and necessary, and their discretion should not be interfered with, nor proceedings taken by any of the beneficiaries to compel the realization of his estate, until his said trustees should deem it advisable to realize it.

The will contained a direction that all moneys to be invested under it should be invested in "stocks funds or securities of or guaranteed by the Government of the *United Kingdom* or of any British Dependency, or in stock of the *Bank of England*, or the debentures or debenture stock or guaranteed or preference stock of any railway company in *Great Britain* or *India* [of a specified kind], or on real or leasehold security in *England* or *Wales*."

By a codicil dated the 1st of October, 1886, the testator appointed his wife *Sarah Piercy* to be an additional trustee and executor of his will.

The testator left his wife *Sarah* and nine children, and also his brother *Robert* and his sister *Jane*, surviving him.

The order for administration was made on the 21st of January, 1889, upon a summons by three of the trustees and executors as Plaintiffs against the widow and one of the children as Defendants. The administration order was served upon the other persons beneficially entitled under the will. By the order various accounts and inquiries were directed, among them being the following inquiry: "An inquiry what was the testator's estate and interest in lands situate elsewhere than in *England*, and whether such estates passed by the testator's will and were validly devised on the trusts thereof, and, if not, who are entitled to such lands, and for what estates and interests."

The testator was the absolute owner of a large extent of land in *Sardinia*. The opinions of a number of Italian advocates were taken as to the validity and effect under Italian law of the devise contained in the will as regarded land in *Italy*.

The following provisions of the Italian Civil Code were the most material:—

"i. Preliminary directions as to the interpretation and application of the law in general.

"Art. 8. Successions by law or under testamentary disposition,

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whether as regards the order of succession, or as to the measure of the rights of succession, or the intrinsic validity of the disposition, are regulated by the national law of the person whose estate is in question: whatever may be the nature of the property, or in whatever country it may be situated.

"Art. 9. . . . . The substance and effect of testamentary dispositions are regulated by the national law of the persons making them. . . . .

"Art. 12. Notwithstanding the provisions of the preceding articles, in no case shall the laws, acts, or judgments of a foreign country, nor private dispositions or agreements, derogate from the prohibitive laws of the kingdom concerning either the persons, the property, or the acts; nor from the laws in any way concerning public order and morality (*il buon costume*).

"ii. Civil Code.

"Art. 899. Any condition imposed upon an heir or legatee, no matter how expressed, that he is to retain the property, and hand it over to a third party, is a trust substitution. Such substitution is forbidden.

"Art. 900. The invalidity of the trust substitution does not affect the validity of the institution of the heir or legatee, to which it is attached: but it invalidates all the substitutions, even those of the first degree."

This code came into operation in 1866: and made very considerable changes in the laws of *Italy* previously in force as to land.

In 1889 the executors mortgaged a part of the testator's land in *Sardinia* to an Italian bank for £20,000. They afterwards sold other portions of the land. Proceedings were also taken in the Italian Court with reference to the registration of the testator's property in *Italy*, for the purpose of ascertaining the duty to be paid thereon according to Italian law.

At the time when this summons was heard the testator's brother and sister were both dead.

Cozens-Hardy, Q.C., and *F. Thompson*, for the trustees, referred to *Earl Nelson* v. *Lord Bridport* (1).

(1) 8 Beav. 527, 547.

S. Hall, Q.C., and *St. John Clerke*, for the testator's heir-at-law, contended that as regarded the land in *Sardinia* the trusts declared by the will were void *in toto* by Italian law, and that there was an intestacy as to that land, which consequently, in accordance with the Code, devolved on the English heir.

Swinfen Eady, Q.C., and *Badcock*, for the testator's younger children and for the personal representatives of the brother and the sister, contended that under the Italian law the direction to settle the shares of the testator's children and brother was void, and that, subject to the widow's life estate, the children and the brother took absolutely, as also did the sister, under the terms of the will.

Sir *A. T. Watson*, Q.C., and *James Rolt*, for grandchildren of the testator, argued that the provisions of the will were good under Italian law, and that at any rate the trust for sale was valid, and the proceeds of sale must be held upon the trusts declared by the will.

P. M. Walters, for the testator's widow.

1894. Nov. 6. NORTH, J. (after stating the provisions of the will, as to which he said no difficulty could arise with respect to the testator's English property, or property which was to be dealt with according to English law, referred to some of the clauses of the Italian Code and the opinions of the Italian advocates, and to the facts, and continued):—

The question is, What is the position of matters as regards the real estate in *Sardinia*? It is not necessary for me to decide the question whether, under Italian law, the trustees take "as heirs," or whether the testator's children and brother and sister take "as heirs," because *quâcunque viâ* the will is good. If the trustees take as heirs, then everything beyond is "trust substitution," which would not be good according to Italian law, but the gift to the heirs would stand. If, on the other hand, as I think, the trustees are not the heirs, but the testator's children and brother and sister are the heirs, then, in my judgment, according to the preponderating weight of opinion, coupled with the

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evidence derived from what has actually taken place, the trustees have, according to Italian law, a clear power to sell the testator's real estate in *Sardinia* without any interference on the part of the persons beneficially interested in it. Therefore the direction given by the will to the trustees to sell the estate is perfectly good according to Italian law.

Then the next question is, as to the application of the proceeds of sale. With respect to that, in my opinion, the will is perfectly good, because the application of the proceeds is not in any way inconsistent with the Italian law. The Italian law relates to the land: it determines how the land is to go, and regulates the rights of the various persons interested in it. When an absolute sale has taken place, the Italian law still applies to the land in the hands of the then owner or owners; but it has nothing whatever to do with the proceeds of sale, after the land has been placed outside the scope of the will by a disposition which is valid according to Italian law.

Then, as regards the proceeds of sale, is there anything in Italian law which renders it illegal for the testator to do what he has done? The testator has directed that the proceeds of the sale of the land—that is, money to be obtained by the English trustees—is to be received by them, to be invested upon English securities, and then to be held by the trustees upon the trusts declared by an English will in favour of English beneficiaries. No one suggests that there is anything in Italian law forbidding this. It is, indeed, said by one of the Italian advocates that the land is the "patrimony," and that, when the land is sold, the proceeds of sale—the money—is still the "patrimony." What is the law as to that? It depends altogether upon the person to whom the money belongs. No doubt, if the money belongs to an owner who is subject to Italian law, whatever the Italian law forbids as to trusts must be observed, and if any person owning this property is subject to Italian law, and attempts to create a trust which the Italian law forbids, then, according to Italian law, the trust would be void. But when there is an English owner of money arising from the sale of land which belongs to other persons, and is subject in their hands to Italian law, there is nothing in Italian law to make that money itself subject to

Italian law; and therefore, in my opinion, the proceeds of sale, when received by the trustees in pursuance of the valid exercise of the power of sale which they have according to the Italian law, pass entirely by the testator's will: because the disposition is good according to English law, and is in no way at variance with Italian law—meaning now by "Italian law" not merely anything which is expressed in the Italian Code, but anything contrary to "good custom" (whatever that may mean)—for the Italian law does not profess to regulate the disposition of English securities passing under the will of an Englishman to English legatees. In my opinion, therefore, the trust for sale being valid, the application of the proceeds of sale directed by the will is valid also.

Then the only question remaining is this. The trust has not yet been entirely executed, and at the present moment a part of the testator's Italian land remains unsold, and is, therefore, subject to the law of *Italy*. The enjoyment of that land in the meantime, until it has been sold, is not in any way affected by the trust for sale, which has not yet been executed. We must look, therefore, to the Italian law to say what is the right to enjoy the land in the meantime, before the sale has actually taken place. I will take first the case of the testator's widow. It seems to me clear that, according to Italian law, she is a "usufructuary," in the sense that the disposition in her favour for life is perfectly good, and that the gift to the testator's children and brother and sister, subject to that usufruct, is a good disposition.

Then comes the question of the "trust substitution"; and as to that, I come to the conclusion upon the evidence that the property is unconverted during that limited period. The Italian law applying, there can be no "trust substitution," and, that being so, the attempt to settle the shares on the children and the brother is not valid. As regards the sister there is no question, because she takes absolutely in any case. As regards the children, to the extent of one moiety of their shares, and the brother as to the whole of his share, there is an attempt to settle. With the exception of the heir-at-law *Robert Charles Piercy* and the brother (who is dead), none of these persons raise any question.

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According to the Italian law they take absolutely, and the trusts over are ineffectual; but with those two exceptions they all say, "We wish to give effect to the testator's will in this respect; we are desirous that the income of the property until conversion shall, so far as our interests go, be applied in the same way as our shares of the income to arise from the proceeds of the conversion directed by the will will go after the conversion has taken place." There is nothing, in my view, contrary to Italian law in their saying that they wish their shares of the income of the unsold land to be applied in the same way as if they were shares of the income arising from the proceeds of sale after the conversion had taken place. The heir-at-law, however, does not elect or waive any right which he may have, and it is unnecessary for me to decide anything as to his share at present. So long as he lives, and the land remains unsold, he will, of course, be entitled to receive the income of his share, whether the trusts in favour of his children are good or bad, and no question between him and his children, or any other person, can possibly arise. It may be that all the land will be sold during his lifetime, and the question will never arise as between him and his children. But it is possible that he may die while part of the land remains unsold, and the question may then arise between him and his children. Any directions, therefore, which I now give must be without prejudice to any question between *Robert Charles Piercy* on the one hand, and, on the other hand, any person who may claim upon his death to be entitled to his one-eleventh of the income to arise from any part of the Italian property then remaining unsold, until the conversion thereof.

The question as to the brother's share of the income of the unsold land must be left open in the same way: as he has died recently, and although his representatives are before the Court, and bound by my decision on the main questions, they are not prepared to consider or discuss this subordinate question at present, and possibly it may never be raised.

Solicitors: *Field, Roscoe & Co.; Crowders & Vizard; Godden, Son, & Holme.*

W. L. C.

In re KNAPP'S SETTLEMENT. KNAPP *v.* VASSALL.

NORTH, J.
1894
Nov. 7, 8

[1894 K. 365.]

Voluntary Settlement—Trust for a Class—Period of ascertaining Class.

The rule in *Andrews* v. *Partington* (1) is not confined to wills, but is applicable to a voluntary settlement (and, *semble*, to a settlement for value).

A fund was settled by a voluntary deed upon such trusts as the settlor should appoint, and in default of appointment for such of the younger children of a third person as should attain twenty-one, or being daughters marry:—

Held, that when one younger child attained a vested interest in possession the class was closed, and such child was entitled to be then paid a share.

By an indenture dated the 21st of February, 1867, *Mathew Grenville Samwell Knapp* (being tenant for life in remainder of certain real estates, settled by deed dated the 28th of September, 1866, with power of appointing portions for his younger children), in exercise of such power charged the settled estate with the sum of £6000, payable among his younger children in such manner and at such times as he should appoint, and in default of appointment to be for the portions of such younger children as should attain twenty-one, or being daughters marry with consent, in equal shares, and be vested at their respectively attaining twenty-one, or marrying if daughters, the share of each child to be paid on vesting or the death of the survivor of the tenant for life in possession and *Mathew Grenville Samwell Knapp*, which event should first happen.

By an indenture dated the 30th of August, 1882, made between *Arthur John Knapp*, a voluntary settlor, of the one part, and *R. L. G. Vassall* and *Thomas Parr*, as trustees, of the other part, the settlor covenanted with the trustees that either he or his representatives within twelve months from his death would pay to the trustees a sum of £14,000, with 4 per cent. interest from his death, to be held upon such trusts as he should by deed

(1) 3 Bro. C. C. 401.

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appoint: and in default of appointment, "In trust to divide the same equally among all the children of the said *Mathew Grenville Samwell Knapp*, who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than and except *John Mathew Knapp*, his eldest son, and such other son or sons, if any, as under the limitations of the said indenture of the 28th day of September, 1866, shall be or become entitled, while under the age of twenty-one years, to the hereditaments, subject to the uses of that indenture as tenant in tail male in possession or in remainder immediately expectant on the decease of the said *Mathew Grenville Samwell Knapp*, to the intent that the said sum of £14,000 shall be in addition to the portions provided for the said younger children by the said indenture of settlement."

That settlement contained a proviso reducing the sums younger children of *Mathew Grenville Samwell Knapp* should take to £2000 in case of there being only one younger child, to £6000 in case of there being only two younger children, and to £10,000 in case of there being only three such younger children; and it was provided that the income of the presumptive share of each infant child of and in the said trust fund should be applicable for his or her maintenance and education under the statutory power in that behalf.

By a disentailing deed dated June, 1889, the real estate subject to the settlement of 1866 was resettled, subject to the charge for portions for younger children, to the use of *Mathew Grenville Samwell Knapp* for life, with remainder to the use of his eldest son, *John Mathew Knapp*, for life, with remainder to his first and other sons in tail male.

Mathew Grenville Samwell Knapp had six children, *John Mathew Knapp*, his eldest son, and five younger children—namely, *Robert Bruce Knapp*, who attained twenty-one in July, 1892; *Catherine Anna Knapp*, who attained twenty-one in May, 1894; and three other children, who were all under age.

Arthur John Knapp, the voluntary settlor, died in 1883, without having exercised his power of appointment under the deed of 1882, and a sum of £14,000 had been duly paid to the

trustees of the settlement of 1882, and invested by them in authorized securities.

The person who was tenant for life in possession in 1867 had since died: but *Mathew Grenville Samwell Knapp* was still living.

By an order made in Chambers on the 8th of August, 1892, on the application of *Robert Bruce Knapp*, it was declared that, under the settlement of August, 1882, *Robert Bruce Knapp* was then entitled to have £2000 out of the £14,000 paid to him, without prejudice to any question, and that he was not then entitled to have any of the income of investments of the £14,000 paid to him, and that the trustees were entitled to pay the income of one-fifth of the investments of the £14,000 for the maintenance of each of the then four infant children. And it was ordered that costs should be paid out of the whole fund.

The value of the trust funds now representing the £14,000, including £2000 paid to *Robert Bruce Knapp* and £700 paid by the trustees for succession duty, exceeded £16,000.

This was an originating summons, to which *Robert Bruce Knapp* and *Catherine Anna Knapp* were Plaintiffs, and the trustees of the settlement and the three youngest children were Defendants. The summons asked for the determination of the following questions: (1.) Whether the Plaintiff, *Robert Bruce Knapp*, was entitled to have a sum of £1000, in addition to the £2000 which had already been paid under the order of August, 1892, subject to succession duty, if any, and with such interest as might be payable. (2.) Whether the Plaintiff, *Catherine Anna Knapp*, was entitled to have now paid her £3000, subject to succession duty, if any, and with interest, if any. (3.) What the right and interests of the Plaintiffs and infant Defendants were in the £14,000.

Swinfen Eady, Q.C., and *Whately*, for the Plaintiffs:—

Where there is a provision for members of a class contingently on their attaining twenty-one simply, any member of that class is entitled, on his attaining twenty-one, to have his share handed over to him, and, to obviate the inconvenience of keeping the

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class open, the Court has laid down the rules that the class from that time cannot be increased, afterborn children being excluded: *Andrews* v. *Partington* (1); *Re Smith* (2); *Gillman* v. *Daunt* (3); *In re Emmet's Estate* (4); *In re Sherwin* (5). It is true that all the cases are cases of wills; but the principle is equally applicable to a settlement—certainly to a voluntary settlement. In the case of a marriage settlement in general there would be no reason to bring the rule into operation, for there would be a life estate in the parent so that there could not be any children born after the first share became payable. Inasmuch as the settlor reserved to himself an overriding power of appointment the settlement is in a similar position to a will.

H. Fellows, for the infant children.

Everitt, Q C, and *Warrington*, for the trustees:—

There is no case in which the principle relied on by counsel for the children has been applied to a settlement. It seems to be the general opinion of conveyancers that the rule is not applicable to marriage settlements—*Vaizey* on Settlements (6)—though it may be to voluntary settlements.

[NORTH, J.—I can understand that, if he means that the rule would not usually be called into play in the case of a marriage settlement, because there would be a previous life interest in the parent.]

The rule is one of hardship to the unborn children, and will not be extended. In this case the voluntary settlement is supplemental to the settlement of the realty, and the shares given by the voluntary settlement are to be in addition to the portions under the settlement of the realty. The members of the class to take such portions cannot be ascertained till the death of the tenant for life—a time when the class will be fixed. The settlor must have intended the same rule to apply in fixing the members of the class to take under his bounty as the class to take portions under the previous settlement.

(1) 3 Bro. C. C. 401.
(2) 2 J. & H. 594.
(3) 3 K. & J. 48.
(4) 13 Ch. D. 484.
(5) [1891] 3 Ch. 197.
(6) Page 1093.

NORTH, J. :—

If the settlor had made the provision he did by will, instead of by a voluntary settlement, it is not disputed for a moment what the position of the parties would be. The children who had attained their age of twenty-one years would be entitled to have their shares actually paid over to them. The result would be that the number of shares must be ascertained, and that being so no person who is not alive can have a share set apart for him. That is the effect of the rule in *Andrews* v. *Partington* (1), and many other cases, and it is too clearly settled for there to be any doubt about it at the present time.

There are only two cases I desire to refer to: one *In re Emmet's Estate* (2), referred to in argument, where the principle is stated; and another by way of illustration of the principle. In *In re Emmet's Estate* the head-note states that the property was limited by a will, on trust to convert, and after payment of debts, &c., to invest, and to permit *H. E.* during his life to receive the rents and income for his own benefit, and after his death, as to one undivided third part, for all the children of *H. E.* equally, the shares to be conveyed and paid to them as they should attain twenty-one, as to sons, and twenty-one or marriage as to daughters. There were clauses of maintenance and accruer. The testator gave another third part of the estates after the death of *H. E.* in favour of the children of his sister, and the remaining third part in trust for all and every the children of *G*, the shares to be conveyed and paid at the ages and times above mentioned; and in case *H. E.* the tenant for life should die without children the share given for them was to be divided between his sister's and *G.'s* children, as the two-thirds given to them. *H. E.* died a bachelor. At his death *G.*, a widower, had two children. He married again, and when his eldest child attained twenty-one he had six children, all of whom lived to attain twenty-one. Another child was born afterwards; and it was held by *Hall*, V.C., and by the Court of Appeal, that the six children, or their legal personal representatives, were entitled to a moiety of the estates. That looks very much like a decision on this exact point; but in fact it was not anything of the kind. The

(1) 3 Bro. C. C. 401. (2) 13 Ch. D. 484.

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question really raised and argued was this, whether the six children took, or whether two of them took, to the exclusion of the other four; and the case of the seventh child seems to have been thought so clear that there was no person to represent that child before the Court at all. It was decided in the absence of that child, and treated as a perfectly clear settled point about which there could be no dispute. There were reasons on the cases for suggesting that it was two instead of six, and that was what was negatived both by the Vice-Chancellor and the Court of Appeal; but the law laid down by Sir *George Jessel* is perfectly clear, in accordance with the earlier cases, and a portion of his statement of the law I must read. He says (1) the will is "as clearly and well drawn as any will need be. Under that will any layman would understand that all the children of *George Nelson Emmet*, at whatever time they were born, would become entitled, and in the absence of authority so should I." That is to say, the words most clearly pointed to all the children. "There has, however, been established a rule of convenience, not founded on any view of the testator's intention, that since when a child wants its share it is convenient that the payment of the share should not be deferred, it shall be made payable by preventing any child born after that time from participating in the fund. The rule is, that, so soon as any child would, if the class were not susceptible of increase, be entitled to call for payment, the class shall become incapable of being increased. That rule of convenience, being opposed to the intention, is not to be applied where it is not necessary, there being also a rule that you let in all who are born up to the time when a share becomes payable." I do not think I need read further, because that is a very clear statement of the law with respect to the rule. The result is that you may have to take a testator's death as the time when the class is ascertained; but if there is a life estate which prevents the distribution of the fund till the life estate is over, then you look to the period of distribution, which is, in that case, the determination of the life estate, and then you find, not who the persons who will take are, but you fix the maximum number of which the class can consist, and then divide

(1) 13 Ch. D. 490.

the shares, as far as they are divisible, upon that footing. If there are six children living, one of whom has attained twenty-one, it will get its one-sixth; if another attains twenty-one, it will get its sixth afterwards; if a third dies after twenty-one it does not take a share, and the fund will be divisible in fifths, and the first two who have had their sixth shares would be found entitled each to one-fifth of another sixth, and so on. In the case of a life estate, the period of distribution is usually the death of the tenant for life, but the period of distribution is not necessarily the determination of the life estate. The period at which the fund has to be distributed is the time that actually has to be taken; and in *Watson* v. *Young* (1), before Mr. Justice *Pearson*, the period of distribution was got at in another way. There was in that case a devise upon trust for *J.* for life, and after his death upon trust for his children who should attain twenty-one, and the issue of any child who should die under twenty-one, leaving issue who should attain that age, but, in case there should be no child, nor the issue of any child of *J.* who should attain twenty-one — that is the event that happened — the property was to be held on trust for the child or children of *R.* who should respectively attain twenty-one, if more than one in equal shares. So that *J.* was tenant for life, and on his death without children, according to the usual rule, the class would be fixed; and so it would be if the trust stopped there; but there was a further provision that the rents of the trust premises should, during the term of twenty-one years from the day next before the day of the testator's death, be accumulated by way of compound interest, and the accumulated fund should be held in trust for the child, if only one, or all the children equally, if more than one, of *R.*, who should attain twenty-one. *J.* died without ever having had a child. *R.* had six children who attained twenty one. The youngest of them was born after the eldest had attained twenty-one, but before the end of the period of accumulation. Although the tenancy for life had expired, a further term had to elapse during which the rents had to be accumulated, and till that period came to an end there could be no distribution, and therefore in that case the

(1) 28 Ch D. 430.

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period for distribution and fixing the class was not the death of the tenant for life, but the expiration of the further period that had to run to make up the twenty one years. The learned Judge seemed to think it was a new case, that is to say, a new state of circumstances to which the rule had to be applied, though he had no difficulty in applying the rule to that new state of things.

In the present case the voluntary settlor has given to all the children of *Mathew Grenville Samwell Knapp* who being a son shall attain twenty-one, or being a daughter or daughters shall attain that age or marry. There was no life estate here; and, therefore, if this had been a will, the effect would be perfectly clear, and as soon as any child had attained twenty-one that child would have been entitled to have its share paid to it, and there are various indications in the settlement pointing that way. The income is given for maintenance during minority only, and the shares vest at twenty-one: this is all the more reason for saying that as soon as the child attained twenty-one the time had come when it was entitled to its share when he came and asked for it.

There are two reasons suggested why the general rule should not apply to this case. The first is that this is not a will but is a voluntary settlement. Now, what difference does that make? I confess I cannot see that it makes any difference. I do not see any logical difference, and I do not see any legal difference. If this gentleman had chosen to make a similar settlement by his will, the matter would have been perfectly clear, and his making the settlement by a deed instead seems to me to come to precisely the same thing. In point of fact, it was as nearly like a will as it could possibly be, because, although he made the settlement, he reserved to himself the general power of appointment over the whole, so that the £14,000 remained in his entire control down to the time of his decease. But neither on legal or logical grounds do I see any distinction between a voluntary settlement and a will. Counsel have told me they could not find (and I certainly do not know of) any case in which the doctrine has been applied to the case of a settlement; but, on the other hand, no one can refer me to any statement in

any case whatever indicating any reason why the rule should not apply to a voluntary settlement—a settlement by a voluntary deed instead of to a settlement by will; and I do not see any distinction between the two. It was suggested that there might have been a distinction if, instead of being a voluntary settlement, the deed had been a settlement for value. I do not quite see what that distinction is; but the case of a settlement for value is not the case that I have to deal with, and therefore about that I say nothing.

The only other ground suggested why the rule in *Andrews v. Partington* (1) should not apply was this: There was a settlement by the settlor upon the children of *Mathew Grenville Samwell Knapp*, who already were entitled under a previous settlement—a settlement made some years before—and they were entitled to certain portions of fixed amounts. In this settlement that I have to deal with the trust as to the £14,000 is to divide the same equally among all the children of the said *Mathew Grenville Samwell Knapp* who being a son or sons shall attain the age of twenty-one years, or being a daughter or daughters shall attain that age or marry, other than and except the said *John Mathew Knapp*, his eldest son. It is said that that clearly points to all the children, and, no doubt, it does. It was as clear here as the Master of the Rolls said the words were in *In re Emmet's Estate* (2); but then the rule of law comes in here, and, although the intention might be to provide for all, this rule of convenience prevents that intention having effect given to it.

But, then, it is said that this made a difference. The provision is not only for all the younger children, but there are these words further on: "To the intent that the said sum of £14,000 shall be in addition to the portions provided for the said younger children by the said indenture of settlement." It was said that that made a difference, because under the original settlement all the children whenever born would take who attained twenty-one, as there was a life estate that must last until the children had all been ascertained by birth, and as all the children therefore were to take under the original settlement, and the shares

(1) 3 Bro. C. C. 401. (2) 13 Ch. D. 484.

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in the £14,000 are to be added to their shares under the former settlement, it must be the intention that all the younger children whenever born should share in the £14,000. That does not make it any clearer that all were to take an addition to the previous gift. Moreover, the reason why they cannot take is, not because it is not the intention that they should take, but because, in spite of the intention, the property has to be divided, inasmuch as the persons who are entitled to absolute shares ask for them, and cannot be gainsaid. Then, further, I do not see that this clause throws any light upon it; because the statement that those who take the £14,000 are to have it in addition to the shares they take under the settlement only means that those who take under both are to have what they take under the second in addition to what they take under the first, and not by way of substitution or satisfaction of the amounts which they take under the first. That phrase does not, therefore, in my opinion, in any way tend to shew that it was the intention that more should take; because the intention already was that all should take, though the intention to carry the gift to a larger number of persons is inconsistent with the right of those who have attained twenty-one to have their shares ascertained and paid to them.

Solicitors for Plaintiffs and infant Defendants: *Roopers & Whately.*

Solicitors for trustees: *Torr & Co.*

D. P.

In re MOODY.
WOODROFFE v. MOODY.

[1891 M. 1588]

KEKEWICH, J.
1894
Oct. 25.

Infant—Legacy by Parent to Infant Child—Interest by way of Maintenance—Exception to General Rule—Other Provision by Testator for Maintenance—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 13—*Incorporation of Section into Will.*

A legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator, notwithstanding that the will contains a provision for the maintenance of the child out of the income of the legacy, or out of the income of a share of residue given to him equally with the other children.

The provisions of sect. 43 of the *Conveyancing Act*, 1881, as to the maintenance of infant legatees must, for the purpose of determining whether a legacy to an infant child carries interest, be treated as incorporated into any will to which they are applicable.

A testator bequeathed a legacy to his infant son payable at twenty-one, and legacies to his daughters, one of whom was an infant, and gave his residuary real and personal estate to trustees upon trusts in favour of his children equally. He declared that his trustees might at their discretion raise any part not exceeding one moiety of the expectant share of any child, and apply the same for his or her advancement, preferment, or benefit. The will contained no express provision for the maintenance of infant children out of income or otherwise, but the provisions contained in sect. 43 of the *Conveyancing Act*, 1881, were applicable:—

Held, that sect. 43 of the *Conveyancing Act*, 1881, ought to be read as part of the will, but that, though it were so read, yet there was nothing in the will to displace the application of the general rule applicable to legacies to infant children, and accordingly that the legacies to the infant son and daughter respectively carried interest as from the death of the testator.

ADJOURNED SUMMONS.

Richard Mullins Moody, by his will dated the 4th of February, 1892, appointed *William Woodroffe* and *Joseph Russell* executors and trustees thereof, and after making specific and pecuniary bequests, the testator proceeded as follows: "I bequeath to my son *William Howard John Moody* the sum of £10,000 to be paid to him on his attaining the age of twenty-one years. I bequeath to each of my married daughters, *Ida Hicks*, *Ellen Gray Knight*, *Mary Potter*, *Lily Row*, and *Annie Muggord* the sum of £6000,

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and to each of my unmarried daughters *Kate* and *Theodora* the sum of £7000, and inasmuch as my married daughters have each received a marriage portion on their marriage, I bequeath to each of my two unmarried daughters, if they shall not be married at my decease, the further sum of £500 in lieu of her marriage portion." The testator devised and bequeathed all his real and personal estate not thereby already disposed of unto his trustees upon trusts for sale and conversion as therein mentioned, and out of the proceeds and out of his ready money to pay his funeral and testamentary expenses and debts and the legacies bequeathed by his will or any codicil thereto, and to invest the residue and to stand possessed of the said moneys upon trust for all his children who being sons had attained or should attain the age of twenty-one years, or being daughters had attained or should attain that age, or had married, or should marry under that age in equal shares, and if there should be only one such child, then the whole was to be in trust for that child; and the testator declared that his trustees might at their discretion raise any part or parts not exceeding together one moiety of the expectant share of any child or grandchild under that his will, and apply the same for his or her advancement, preferment, or benefit as his said trustees should think fit. The will contained no express provision for the maintenance of infant children out of income or otherwise.

The testator died on the 9th of July, 1893. He had only the eight children named in the will. Two of these were infants, viz., *Theodora Moody*, who was born on the 27th of February, 1873, and did not therefore attain the age of twenty-one years until the 27th of February, 1894, *i.e.*, nearly eight months after the testator's death, and *William Howard John Moody*, who was born on the 14th of November, 1874, and would not therefore attain the age of twenty-one years until the 14th of November, 1895.

An originating summons was taken out by *William Woodroffe* and *Joseph Russell* (the executors) as Plaintiffs, against *Theodora Moody*, *William Howard John Moody*, and *Mary Potter*, as Defendants, for the determination of the two following questions. First, whether the two several legacies of £7000 and £500

by the will bequeathed to the Defendant *Theodora Moody*, either of them, carried interest or income as from the 9th of July, 1893 (the date of the testator's death), or from any other date; and secondly, whether the legacy of £10,000 by the will bequeathed to the infant Defendant, *William Howard John Moody*, but to be paid to him on his attaining the age of twenty-one years, carried interest or income as from the 9th of July, 1893, or any other date, and whether such interest or income was applicable for the maintenance, education, or benefit of the said infant.

The summons was adjourned into Court, and now came on for hearing.

Davenport, for the Plaintiffs, stated the case.

Warmington, Q.C., and *R. H. Hodge*, for the Defendants, the infant children:—

We submit that the legacies to the infant children carry interest from the death of the testator. There is nothing in this will to take the case out of the general rule that a legacy by a parent to an infant child carries interest by way of maintenance from the death of the testator. The rule in its origin was based on the ground that the Court would not "presume the father inofficious, or so unnatural, as to leave a child destitute": *Heath* v. *Perry* (1); and see *Beckford* v. *Tobin* (2). But the rule has now become one of construction, and "let the testator give it how he will, either at twenty-one, or at marriage, or payable at twenty-one, or payable at marriage" (see *Heath* v. *Perry*), the Court construes the legacy as carrying interest from the death, unless there is something in the will to negative that construction. The recognised exception is where the testator has designated some other fund out of which the child is to be maintained. This testator has not done that. The provision of sect. 43 of the *Conveyancing Act*, 1881, is a mere power, and even if the will contained such a power in express words it would not be sufficient to displace the right of the child to interest from the death of the testator, or bring the case

(1) 3 Atk. 101. (2) 1 Ves. Sen. 307.

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within the exception. At one time if a testator had by his will designated a sum wholly insufficient for the maintenance of the child it was considered that the general law prevailed, and the legacy did not carry interest until a year from the testator's death. But recently that view has been departed from, and it is clear that where the fund designated is insufficient, the testator is only less inofficious, but he is still inofficious. *Donovan* v. *Needham* (1) will be cited against us, but in that case there was an express direction that the trustees should during minorities pay and advance sums for maintenance.

[KEKEWICH, J.:— *Donovan* v *Needham* and *Wynch* v *Wynch* (2), to which Lord *Langdale* refers in *Donovan* v. *Needham*, were not cases in which there was a provision for interest being applied for maintenance out of the legacy. Is there any authority that because there is a provision for maintenance out of the income of the particular legacy, the rule giving interest from the death is displaced?]

We are not aware of any; but it is submitted there is no such provision here. There is no maintenance clause at all, but only an advancement clause.

[KEKEWICH, J.:—That does not touch the question of income.]

[They referred also to *In re Holford* (3), and *In re Jeffery* (4).]

Jason Smith, for the Defendant *Mary Potter* (who was appointed by the Court to represent the other daughters of the testator):—

There is sufficient in this will to take the case out of the ordinary rule giving interest to the infant children, and to bring it within the exception enunciated by *James*, L.J., in *In re George* (5), where "the testator has provided another fund for" the child's "maintenance, so that the income of the legacy is supposed not to be required for the purpose." The law is similarly stated by Sir *George Jessel*, M.R., in *May v. Potter* (6).

Here, independently of sect. 43 of the *Conveyancing Act*, 1881,

(1) 9 Beav. 164.
(2) 1 Cox, 433.
(3) [1894] 3 Ch. 30.
(4) [1891] 1 Ch. 671.
(5) 5 Ch. D. 837, 843.
(6) 25 W. R. 507.

the testator has provided another fund for maintenance by directing that the children's shares of residue may be applied for their "advancement, preferment, or benefit." The word "benefit" is the widest possible, and must include maintenance. The clause is very similar to that in *Donovan* v. *Needham* (1), where a direction that trustees should pay and advance such sums of money as they might think fit for the education, maintenance, and clothing of the children, was held to exclude the general rule.

But further, this will must be read as though sect. 43 of the *Conveyancing Act*, 1881, were incorporated into it, and formed a part of it. *In re Holford* (2) is an authority for that. It follows that there is in this will provision made for the maintenance of infant children, not only out of the legacies given to them, but also out of their shares of residue. Clearly, therefore, there is a fund, other than the legacies, provided by the testator for maintenance. The provision of sect. 43 of the *Conveyancing Act*, 1881, though in the form of a power, really amounts to a trust for the benefit of the infant child.

Moreover, the application of the general rule in this case would plainly defeat the intention of the testator. He has shewn an anxious desire to place all his daughters on a footing of equality, and if the infant daughter is held entitled to interest from the testator's death she will receive more than her sisters.

KEKEWICH, J.:—

The first point with which I will deal is the general one whether the 43rd section of the *Conveyancing Act*, 1881, must for the purposes of decision in this case be read into the will and form a part of it, so that in construing the will I must regard the provisions of the section as being inserted by the draftsman notwithstanding that in fact the words are not written in the will. It seems to me that the proper principle is to regard the section as incorporated in the will. If I am wrong in that, I shall be corrected, though I cannot help saying that I should be sorry if I were corrected, for it does seem to me that it would be an unfortunate thing if draftsmen were obliged to insert in

(1) 9 Beav. 164. (2) [1894] 3 Ch. 30

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wills or other instruments their own provisions for maintenance, because they could not rely on the provision in the Act as being part of the instrument they were settling.

Years before the *Conveyancing Act* of 1881 was passed there was an Act familiar to the lawyers of those days, known as *Lord Cranworth's Act* (23 & 24 Vict. c. 145), and that Act was expressly intituled "An Act to give to trustees, mortgagees and others certain powers now commonly inserted in settlements, mortgages, and wills." There was a recital in *Lord Cranworth's Act* indicating the convenience which would result from a general enactment of common forms. That Act is repealed by the Act of 1881, which, though not intituled in the same way, must I think be taken to have repeated with variations the provisions of *Lord Cranworth's Act*, not only to the same end but for the same purpose, that is to say to prevent repetition and dispense with the necessity of inserting clauses in wills and settlements. I think the proper course is for me to regard sect. 43 of the Act of 1881 as being a paragraph or clause in the particular will which I have to construe, and I proceed to deal with the case on that footing.

The law as regards interest on legacies bequeathed to infants by a parent or person in *loco parentis* is perfectly clear. Mr. *Jason Smith* says that the application of that law to this case will operate rather hardly upon those children who attained their majorities in the testator's lifetime. I do not think that is so. The object of the law, as laid down by Lord *Hardwicke*, is to provide for the maintenance of those infants to maintain whom the testator is either under a legal obligation as parent, or under a moral obligation as having assumed to place himself in *loco parentis*. In either case there is the obligation to provide income for the maintenance of the children who presumably require maintenance, and the fact that if income is provided for the maintenance of the infant child who requires maintenance less is left for another child who does not require maintenance does not seem to me to be a hardship, and cannot alter the application of settled rules of law. Here are two children, one entitled to a legacy of £10,000 on attaining twenty-one, and the other entitled to legacies of £7000 and £500 absolutely, that

is, without attaining twenty-one. There is no express provision for their maintenance unless it is to be found in the clause which follows the residuary gift. All the children take the residue equally, and there is a declaration that the trustees may in their discretion raise any part or parts not exceeding together one moiety of the expectant share of any child and apply the same for his or her advancement, preferment, or benefit as the trustees shall think fit. Cases have frequently occurred where there was no provision for maintenance, but there was a provision, such as is found here, for advancement, preferment, or benefit, and the Court has allowed capital to be taken for education under the words advancement, preferment, or benefit. The difficulty arising from the absence of a provision for maintenance has been got rid of by applying, literally perhaps but still rather broadly, a clause which was not intended to be really a maintenance clause. I have myself, in common with other judges, approved of that course, but I should not therefore call the clause a provision for the maintenance of the children, or regard it as introduced for that purpose. The result is that in this case there is no express provision for maintenance of these infant children out of any fund other than their respective legacies. Then sect. 43 of the Act of 1881, if incorporated here, confers a power to apply for or towards an infant's maintenance the income of the property held in trust for him, that is in this case, the income of the infant's legacy, and I have asked counsel to refer me to any case in which it has been held that a direction to apply the income of the legacy to the maintenance of the child defeats the rule that a legacy given to an infant child by a parent carries interest from the date of the parent's death. No such case has been quoted I should have been surprised if there had been such a case, for a direction of that kind would seem to point to interest running from the death rather than otherwise.

I must add a few words as to the cases cited. I have before me the report of *Wynch* v. *Wynch* (1) to which I have been referred, because I thought it well to see whether anything more was to be got from that case than is to be found in the statement of it by Lord *Langdale* in *Donovan* v. *Needham* (2), and I do not

(1) 1 Cox, 433. (2) 9 Beav. 164.

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find that there is anything material beyond what is there said. Then there were the two cases decided by Lord *Hardwicke*; but Mr. *Jason Smith* properly relied, as summing up the law, on the judgment in *In re George* (1). "The rule of law" as was said by the Lord Justice *James* in that case (2) "is well established that a contingent legacy does not carry interest while it is in suspense, except in the case of a legacy by a parent or one standing *in loco parentis* to the legatee; and that exception is subject to another exception, that the rule giving interest to the child does not take effect when the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." There the Lord Justice is really putting, in his own language, all that is said by Lord *Hardwicke*, Lord *Kenyon*, and Lord *Langdale*. Here I am not dealing with a case of a provision for maintenance out of any other fund, unless one is to be found in the gift of residue. As to that, Mr. *Jason Smith* says these children take the residue subject to the incorporation in the gift to them of the 43rd section of the Act of 1881, and that there is in that way a provision for the maintenance of the children out of the income of the residue. Therefore, he says, there is a provision for their maintenance otherwise than out of the income of the legacies, and therefore the general rule does not apply, but the case falls within the exception to it, because the testator has provided another fund for the maintenance, so that the income of the legacy is not required for the maintenance. No case has been quoted where the other fund has been a share of residue given to the children, and until some case of that kind has been found I should be extremely unwilling to construe that as coming within the exception mentioned by the Lord Justice *James*. A residue is an unascertained amount. It might be quite uncertain what the share of each child would be in the residue, and all the cases, as I understand them, go to this—that you must regard the question with reference to the money given to the child. No doubt in the case of *Wynch* v. *Wynch* (3) before Lord *Kenyon*, and in the case of *Donovan* v. *Needham* (4)

(1) 5 Ch. D. 837.
(2) Ibid. 843.
(3) 1 Cox, 433.
(4) 9 Beav. 164.

before Lord *Langdale*, the provision was for payment out of the general estate; it was, however, not out of a share of residue, but out of the general estate of the testator disposed of by the will. So far as I am aware, this is a novel case. It seems to me that a provision for payment of maintenance to a child out of the income of his share of residue given to him with the other children, does not come within the exception mentioned by the Lord Justice *James* in the case of *In re George* (1), where "the testator has provided another fund for his maintenance, so that the income of the legacy is supposed not to be required for the purpose." I am aware of no authority the one way or the other on the particular point, and therefore I am obliged to decide it so far as I can on the application of the general rule to the particular facts which arise here, and without the guidance of authority. I think that both the legatees are entitled to maintenance from the testator's death; that is, to interest on their legacies at 4 per cent. so long as the legacies form part of the testator's general estate, and from the time when they are segregated or appropriated the actual interest realized.

Solicitors: *Phelps, Sidgwick, & Biddle; T. Wilkinson; Jennings & Son.*

C. C. M. D.

In re BENDY.
WALLIS *v.* BENDY.

[1894 B. 2297.]

KEKEWICH, J.
1894
Oct 26, Nov 13

Marriage Settlement—Covenant to Settle Wife's other and after-acquired Property—Income—Accumulations—Purchase by Wife during her Coverture—Loan—Charge in Favour of Trustees.

If income not originally included in a covenant in a marriage settlement to settle other and after-acquired property is so invested as to indicate a permanent intention on the part of the owner to turn it into capital, such investment becomes subject to the covenant, provided the terms are sufficiently large to include it as capital.

The same result follows in the case of a sale of capital property not

(1) 5 Ch. D. 848.

KEKEWICH, J.

1894

In re BENDY WALLIS v. BENDY

originally included in the covenant, where the proceeds are laid out in the purchase of other property coming within the terms of the covenant.

Lewis v. *Madocks* (1) discussed.

By the ante-nuptial settlement, dated the 21th of June, 1890, of *Wilfred Bendy* and *Sarah Barbara Bendy* (then *Wallis*), it was declared that the trustees should stand possessed of certain stocks and securities belonging to the intended wife upon trust, after the marriage, with the consent of the husband and wife or the survivor of them, and after the death of the survivor at the discretion of the trustees, to sell the same and invest the proceeds as therein mentioned, and to pay the income to the wife during her life for her separate use without power of anticipation, and, after her death, to the husband during his life, subject to certain trusts on alienation, and, after the death of the survivor of the husband and wife, upon the usual trusts for the children of the marriage, with an ultimate trust, in default of children attaining a vested interest, if the wife should predecease her husband, for her next of kin according to the statute, as if she had died a spinster. The settlement contained the following covenant: "And it is hereby covenanted, agreed, and declared by and between the parties hereto that if the said *S. B. Wallis* shall at the time of the said now intended marriage be, or if at any time during the said now intended coverture she shall become seized, possessed, or entitled of or to any real or personal property (other than the property hereby specifically settled) for any estate or interest whatsoever in possession, reversion, remainder, or expectancy, except any property of or to which she is at the present time possessed or entitled, and except property of a less value than £200 vesting in possession before or during the said now intended coverture at the same time and from the said source, and except movable chattels or effects of household, domestic, or personal use or ornament, all of which excepted property it is hereby declared shall be and remain the absolute property of the said *S. B. Wallis*, and except also an annuity or annuities or other estate or interest for the life of the said *S. B. Wallis*, or for any term or period determinable upon her death, which it is hereby declared shall belong to the said *S. B. Wallis* as her separate

(1) 3 Ves. 150, 17 Ves. 48.

estate independently of the said W. *Bendy*, and so that she shall not have power to anticipate the same, then and so often as the same shall happen all such real and personal property, except as aforesaid, shall at the cost of the trust estate be forthwith assured or transferred to the trustees or trustee upon trusts as nearly corresponding with the trusts hereby declared of the trust funds hereinbefore settled as may be, and so that such real property shall be impressed with a trust for conversion into money and be settled as personal estate."

At the date of the settlement and of her marriage Mrs. *Bendy* was possessed of or entitled to, in addition to the settled property, (1.) an undivided moiety of a leasehold house in *Camden Road, Islington*, and (2.) seven shares in the *Standard Bank of South Africa*.

In August, 1891, after the marriage, the leasehold house was sold, Mrs. *Bendy's* moiety realizing £425, which was paid to her. In September following she bought £400 6 per cent. debentures of *Wallis & Co., Limited*, paying for them out of a balance of £790 then standing to her credit at her bankers, and made up partly of the £425 and partly of accumulations of income paid to her under the trusts of the settlement.

In February, 1892, Mrs. *Bendy* sold the seven shares in the *Standard Bank of South Africa* for £362, which she paid into her banking account, and shortly afterwards she purchased a leasehold house, No. 18, *Gloucester Road, Finsbury Park*, for £900, of which the greater part was paid with the proceeds of the bank shares and accumulations of income paid to her under the trusts of the settlement, and the balance, £350, was borrowed by her from her bankers. This loan was, it appeared, afterwards repaid partly by her and partly by her husband, but in what proportions there was no evidence to show.

Mrs. *Bendy* died on the 17th of March, 1894, and her husband took out administration to her estate. There was issue of the marriage one child only, an infant. The main question, raised by an originating summons by the trustees of the settlement (one of whom would be entitled under the settlement as one of the wife's next of kin in default of children) against the husband and child, was whether the debentures and house purchased by

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Mrs. *Bendy* as above mentioned, or which of those properties, were or was within the operation of the covenant to settle her other or after-acquired property.

P. F. S. Stokes, for the Plaintiffs :—

When income is capitalized, as it was here, it becomes subject to a covenant to settle capital: *Lewis* v. *Madocks* (1). Accordingly, the properties purchased by Mrs. *Bendy* should stand subject to a charge in favour of the trustees for the amount of income capitalized.

G. N. Trollope, for the infant Defendant:—

This case is clearly covered by *Lewis* v. *Madocks*. Income, when invested and so converted into capital, becomes subject to such a covenant as this for settlement of other and after-acquired property.

The question is not whether the covenant is too wide for the Court to enforce it as a general covenant to assign all the settlor's property: it is sufficient to say that the Court will enforce it as regards this capitalized income, on the ground that the covenant is divisible: *In re Turcan* (2).

Warmington, Q.C., and *T. D. Munns*, for the Defendant, *W. Bendy*:—

The husband's interest, as his wife's administrator, is to contend that the properties purchased by her are not bound by the covenant and belonged to her absolutely, free from any charge in favour of the trustees.

The moiety of the house in *Camden Road* and the seven bank shares which the lady had at the time of her marriage come within the exception, and the properties purchased with the proceeds of them stand in the same position. The fact that part of the purchase-money came from accumulated arrears of income makes no difference. There is no authority that, where a married woman has invested accumulations of income belonging to her for her separate use, those accumulations come within such a covenant as this. Neither does the fact of the lady having borrowed

(1) 8 Ves. 150; 17 Ves. 48. (2) 40 Ch. D. 5, 9.

money from her bankers to make up the purchase-money give the trustees of the settlement any title under the covenant to the property purchased. In *Lewis* v. *Madocks* (1) and *In re Turcan* (2) the covenant covered the settlor's entire property without any exception, and the Court had to construe it so as to make it reasonable; whereas here there is an exception, the effect of which is to enable the lady to deal with all property belonging to her at the time of the marriage, other than that settled, in the fullest manner. It would be contrary to equity to say that, if she sold such property, the proceeds, or the investments representing it, must be held to go to someone else.

KEKEWICH, J.:—

This is a strange point, and I do not remember ever having to consider it before. As to the construction of the covenant, I have no doubt I ought to construe it grammatically, notwithstanding the language of the exception; that is to say, in my opinion, the exception includes property to which the lady was entitled at the date of the settlement. But as to the other point I must look into the authorities.

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On the conclusion of the argument I expressed the opinion that the exception from the covenant to settle property of the wife other than that specified must be construed to comprise, that is, to exclude from the operation of the covenant, property to which the wife was entitled at the date of the settlement. There is obviously some blunder, and the result may or may not be what was intended; but I can put no other construction on the words. Therefore, what belonged to the wife at the date of the marriage, not being specifically comprised in the settlement, remained hers unaffected by the covenant. During the coverture she received income for her separate use, and whatever was so received remained separate estate; that is to say, the property of the wife independent of marital control, in whatever form it might from time to time be found. This proposition was not

(1) 8 Ves. 150; 17 Ves. 48. (2) 40 Ch. D. 5.

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contested in argument, and therefore no authority was cited for it; but authorities would be forthcoming if required.

The question which I have to decide is whether the property thus excepted from the covenant, and the savings of separate estate, have, to any and what extent, been made subject to the covenant by subsequent dealings therewith on the part of the lady. It is one of novelty and difficulty. It may fairly be said to be one of novelty notwithstanding the case of *Lewis* v. *Madocks* (1); for, although that case states and proceeds on a principle with which I will deal presently, it is in many respects very different from this. The essential difference consists in the fact that in *Lewis* v. *Madocks* there was a covenant by a man to settle all his property at any time coming to him, which would include his means of subsistence and means of supporting his wife, so as, from one point of view, to amount to an absurdity; whereas here the covenant binds only the property of a married woman, the settlement of which is not open to a similar objection, and which has always been regarded as the appropriate subject of a covenant of this character. Notwithstanding my trust in the industry of counsel, I hoped that further research would disclose some case giving instruction, by comment or otherwise, respecting *Lewis* v. *Madocks*. I have found many cases in which it was cited, including *In re Turcan* (2), to which reference was made in argument; but in none is there any comment on the principle of *Lewis* v. *Madocks* which I am asked to apply here; and I am equally without any expression of assent to or dissent from it. The principle of *Lewis* v. *Madocks*, so far as it is necessary to consider it for the present purpose, seems to be this, that although a covenant to settle other or after-acquired property (I use a somewhat vague phrase, but one which will readily be understood by lawyers) must be reasonably construed, and therefore will not be held to include such property as cannot be included without defeating the paramount object of the settlement, such as income required for household or other expenses, or, as in this case, money which was obviously intended to be retained or expended at pleasure; yet, if it be once so invested as to indicate a permanent intention on the part of the owner to convert it into

(1) 8 Ves. 150; 10 Ves. 48.

(2) 40 Ch. D. 5.